87-508

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

THE MIAMI HERALD PUBLISHING COMPANY,
Petitioner,

vs.

THE HONORABLE RICHARD BRYAN BURK, LINDA AURILIO, and THE STATE OF FLORIDA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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36 pp

QUESTION PRESENTED FOR REVIEW

Whether the Florida Supreme Court has construed *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), consistently with the First Amendment by adopting a *per se* rule permanently denying the press and public access to unfiled deposition transcripts in criminal prosecutions, even where the defendant objects to the denial of access, and the state makes no claim of "good cause" for the closure.

PARTIES TO THE PROCEEDINGS BELOW

The following is a list of all parties appearing in the proceedings before the Florida Supreme Court:

Petitioners

Palm Beach Newspapers, Inc.
The Miami Herald Publishing Company
The News and Sun Sentinel Company

Respondents

The Honorable Richard Bryan Burk
Linda Aurilio
The State of Florida

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THE HONORABLE RICHARD BRYAN BURK, LINDA AURILIO, and THE STATE OF FLORIDA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner The Miami Herald Publishing Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Florida entered in the above proceeding.

OPINIONS IN THE COURT BELOW

The opinion of the Supreme Court of Florida in *Palm Beach Newspapers, Inc. v. Burk* ("*Burk*") appears at 504 So.2d 378 (Fla. 1987), and is reprinted in the joint appendix, A. 2-20. The opinion of the Fourth District Court of Appeal in *Palm Beach Newspapers, Inc. v. Burk* appears at 471 So.2d 571 (Fla. 4th Dist. Ct. App. 1985) (*en banc*), and is reprinted in the joint appendix, A. 23-54. The orders entered by the Circuit Court of the Fifteenth Judicial Circuit in *State v. Aurilio* have not been reported. They are reprinted in the joint appendix. A. 55-67.

JURISDICTION

The opinion of the Supreme Court of Florida in *Burk* was entered on February 19, 1987. A Motion for Rehearing was timely filed on March 16, 1987, which motion was denied by the Supreme Court of Florida on April 21, 1987. On July 7, 1987, Justice White ordered that the time for filing this petition for writ of certiorari be extended to and including August 19, 1987. Subsequently, on August 11, 1987, Justice Scalia ordered that the time for filing a petition for writ of certiorari be extended to and including September 4, 1987.

This petition has been filed and docketed within the period established by Supreme Court Rule 29.1. The Court has jurisdiction to review the judgment of the Supreme Court of Florida under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The constitutional provisions and rules involved are:

United States Constitution, Amendment I;

United States Constitution, Amendment XIV, Section 1;

Rule 3.220, Florida Rules of Criminal Procedure;

Rule 1.280(c), Florida Rules of Civil Procedure;

Rule 1.310(f) and (g), Florida Rules of Civil Procedure; and

Rule 1.080(d), Florida Rules of Civil Procedure.

The pertinent text of the foregoing constitutional provisions and rules is reproduced in the Joint Appendix of Petitioners Palm Beach Newspapers, Inc. and The Miami Herald Publishing Company.

STATEMENT OF THE CASE

The State of Florida disposes of approximately 97% of its criminal prosecutions without trial.[1] Consequently, Florida's criminal justice system may be fairly characterized as primarily a pretrial process, and press access to that process is essential for the public to understand and monitor its workings.

Perhaps the major factor contributing to Florida's high rate of pretrial dispositions is the broad discovery right afforded its criminal defendants. Criminal defendants are granted the opportunity to take discovery and conduct depositions in a manner closely analogous to the procedure afforded civil litigants by the Federal Rules of Civil Procedure. Specifically, Rule 3.220, Florida Rules

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1. According to figures provided by the Florida Supreme Court Summary Reporting Service and compiled by the State Court Administrative Office, in recent years, more than 95% of criminal dispositions occurred without trial:

DISPOSITION	CIRCUIT COURT STATEWIDE			COUNTY COURT STATEWIDE		
	1982	1983	1984	1982	1983	1984
Total Defendants Accused	157,640	154,750	163,604	346,752	331,611	348,354
Total Cases Disposed	153,333	149,615	151,723	303,009	322,047	310,108
Total Cases Tried	4,817	4,831	3,761	12,533	11,263	9,280
Total Cases Disposed without trial	148,516	144,784	147,962	290,476	310,784	300,828
Percentage of disposed cases without trial	96.86%	96.77%	97.5%	95.86%	96.5%	97%

of Criminal Procedure, permits criminal defendants to depose the witnesses for the state and to ask them a wide range of questions. Protective orders are available for the same reasons and to the same extent as in civil proceedings. The primary difference between the Florida criminal rule and its federal civil counterpart is that the Florida process is optional. Defendants may, but are not required to, invoke discovery. The state is permitted reciprocal discovery only in the event the defendant exercises his option.[2]

Since few Florida criminal cases proceed to trial, journalists for *The Miami Herald* have come to depend heavily on the sworn testimony presented in depositions to report fully and accurately on prosecutions of legitimate public concern.[3] The Florida criminal deposition is fre-

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2. At least five other states permit criminal defendants similarly expansive discovery rights. *See, e.g.*, Ind. Code § 35-37-4-3; Rule 12, Iowa R.Crim.P.; Rule 25.12, Mo. R.Crim.P.; Rule 15, N.D. R.Crim.P.; N.H. Rev. Stat. Ann. § 517:13.

3. Prior to *Burk*, Florida trial judges repeatedly had held that members of the press enjoyed a qualified right to both attend depositions taken in criminal cases and inspect transcripts. *See, e.g., Florida v. O'Dowd*, 9 Media L. Rep. 2455 (BNA) (Fla. 18th Cir. Ct. Oct. 13, 1983) (Mize, J.); *Florida v. Tolmie*, 9 Media L. Rep. 1407 (BNA) (Fla. 15th Cir. Ct. March 3, 1983) (Cook, J.); *Florida v. Reid*, 8 Media L. Rep. 1249 (BNA) (Fla. 15th Cir. Ct. March 8, 1982) (Goldman, J.); *Florida v. Sanchez*, 7 Media L. Rep. 2338 (BNA) (Fla. 15th Cir. Ct. Nov. 17, 1981) (Mounts, J.); *Florida v. Hodges*, 7 Media L. Rep. 2424 (BNA) (Fla. 20th Cir. Ct. Dec. 21, 1981) (Pack, J.); *Florida v. Alford*, 5 Media L. Rep. 2054 (BNA) (Fla. 15th Cir. Ct. Oct. 19, 1979) (Mounts, J.); *Florida v. Diggs*, 5 Media L. Rep. 2597 (BNA) (Fla. 11th Cir. Ct. March 4, 1980) (Nesbitt, J.); *Florida v. Bundy*, 48 Fla. Supp. 205 (Fla. 2d Cir. Ct. Apr. 26, 1979) (Cowart, J.). Civil depositions were likewise presumed open in Florida prior to *Burk*. *Withlacoochee v. Seminole Electric*, 1 Fla.Supp.2d 1377, 8 Media L. Rep. 1281 (BNA) (Fla. 13th Cir. Ct. March 11, 1982) (Miller, J.); *Cazarez v. Church of Scientology*, 6 Media L. Rep. 2109 (BNA) (Fla. 6th Cir. Ct. Oct. 31, 1980) (Bryson, J.); *Johnson v. Broward County*, 7 Media L. Rep. 2125 (BNA) (Fla. 17th Cir. Ct. Oct. 22, 1981).

quently the only evidentiary predicate for dismissals, plea bargains, *nolle prosequi* and guilty pleas. And, since Florida has abandoned the elaborate public preliminary hearing procedure characteristic of states like California,[4] depositions are typically the only source of information about these pretrial dispositions. This reliance on deposition testimony proceeded for years largely without comment or moment[5] because transcripts were routinely filed in the public court file pursuant to both practice and the rules. It was not until Florida's adoption of new "housekeeping" rules, designed to "relieve the document storage burden" all courts began to experience in the last decade, that parties no longer filed deposition transcripts as a matter of course.[6]

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4. In *Press-Enterprise Co. v. Superior Court,* ..... U.S. ....., 106 S.Ct. 2735 (1986) (*"Press-Enterprise II"*) this Court recognized a First Amendment right of access to California type criminal preliminary hearings. Prior to its adoption of the criminal discovery rules in 1972, Florida utilized an elaborate preliminary hearing process in which defendants were permitted to call witnesses and to cross-examine those called by the state. *See* Rule 1.22, Florida Rules of Criminal Procedure (1968). Florida affords this process today only in cases in which an indictment or information is not filed within 21 days of arrest. Defendants typically depend on Florida's expansive discovery process to learn the information formerly available through the preliminary hearing.

5. Throughout this period, only three cases involving deposition access reached the Florida appellate courts, and each affirmed the qualified right to monitor the deposition process. *See Ocala Star Banner Corp. v. Sturgis,* 388 So.2d 1367 (Fla. 5th Dist. Ct. App. 1980); *Sentinel Star Co. v. Booth,* 372 So.2d 100 (Fla. 2d Dist. Ct. App. 1979); *Tallahassee Democrat, Inc. v. Willis,* 370 So.2d 867 (Fla. 1st Dist. Ct. App. 1979).

6. *See In re Florida Rules of Civil Procedure,* 403 So.2d 926, 930 (Fla. 1981) (adopting Rule 1.310(f) to restrict the filing requirement "in an effort to relieve the document storage burden now experienced by all segments of Florida's court system"); *see also* Rule 5(d), Federal Rules of Civil Procedure, Notes of Advisory Committee, 1980 Amendment ("large volume of discovery filings presents serious problems of storage . . . but such materials are sometimes of interest to those who may have no access to them except by a requirement of filing").

While the document filing rules were never intended to diminish substantive public access rights, they have had just this consequence in Florida. In fact, as *Burk* and the two companion cases described herein[7] amply demonstrate, these rules have provided the opportunity for the parties to a criminal prosecution, or even the state acting alone, to control public knowledge of the criminal action by manipulation of the filing rule. Worse yet, the Florida court has adopted a *per se* rule precluding the press from ever inspecting any unfiled depositions where either party to the criminal prosecution objects to access, even should the defendant want public access and the state offer no reason, let alone "good cause," for a permanent closure.

A. Miami Herald Publishing Company v. Burk

On September 20, 1982, Linda Aurilio ("Aurilio") was charged with the attempted murder of her husband Carl. Public concern for the prosecution was great because Aurilio was a key witness for the state against her husband, nine other persons, and several government officials in a multi-million dollar bookmaking operation.

Shortly therafter, Aurilio's counsel—a court-appointed public defender—invoked discovery and scheduled the depositions of the state's witnesses. Notices of deposition

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7. The two companion cases are *Miami Herald Publishing Co. v. Hagler*, 506 So.2d 1037 (Fla. 1987) (*"Hagler"*) and *Palm Beach Newspapers, Inc. v. State*, 506 So.2d 1037 (Fla. 1987) (*"State"*). The Florida Supreme Court accepted jurisdiction in these two cases and they were fully briefed in that court. However, the court summarily disposed of them, explicitly on the basis of *Burk*, by denying review. Consequently, *Hagler* and *State* could not be consolidated with *Burk* in this petition. *See* Rule 19.4, Rules of the Supreme Court. A second, but in all pertinent respects identical, consolidated petition has been filed in *Hagler* and *State* simultaneously with this petition. For the Court's convenience, the facts of all three cases are included in both petitions. The Miami Herald respectfully requests that the Court consider the two petitions together.

were properly filed with the clerk of the court. Because of the public interest in the case, a reporter for the *Fort Lauderdale News and Sun-Sentinel* arrived at the first scheduled deposition and indicated that he wished to attend. The state attorney and Aurilio's public defender agreed to suspend the deposition so the state could seek a court order barring the press and public from all future depositions in the case.

Subsequently, the prosecution filed a "motion for protective order" excluding the press and public from attending the depositions and sealing the transcripts of all depositions. Defense counsel refused to join in the state's motion but indicated he had no objection to it, and counsel for the press intervened and opposed the motion. No party offered any evidence in support of the motion for protective order. Thus, Judge Rodgers denied the state's motion without prejudice stating:

> Certainly I would be in error to just issue a blanket rule that no depositions in this case are open to the press. (Hearing, December 2, 1982, at 30).

See A. 66-67. It was agreed that if a particular problem relating to press access arose during the depositions, the parties could return to the court at that time.

But the opportunity to return never arose. In an effort to circumvent the court's order, the state attorney and defense counsel agreed to take the depositions without filing the proper notices with the clerk of the court. Upon learning of the unnoticed depositions, the press requested copies of the transcripts of the depositions from the state attorney, defense counsel, and the court reporter.

The state attorney and the court reporter refused the request. Defense counsel, however, filed a "motion

to determine defendant's sixth amendment rights, to determine status of transcripts under Florida law and to prevent further harassment by press." A hearing was held on the motion, and, as before, no evidence in support of closure was presented. Notwithstanding this fact, on January 18, 1983, Judge Rodgers receded from his prior order and ruled that the parties could exclude the press from the depositions without showing "good cause" provided no judicial process was involved, other than the issuance of a subpoena. A. 61-65.

On February 9, 1983, the press again moved to obtain access to the depositions in the Aurilio case. By this time the case had been reassigned to the Honorable Richard Bryan Burk. At a hearing on the motions, defense counsel indicated that she and the state attorney had "stipulated" that if the depositions were open and the information disclosed published, "it would be impossible to have a fair trial in Palm Beach County." No evidence was offered in support of this "stipulation." In an order dated February 11, 1983, Judge Burk held that the press could not attend the depositions in the case, but that the transcripts of all depositions would have to be released unless a party obtained a court order to seal those portions of the depositions deemed "objectionable." A. 58-60.

The press filed a motion to reconsider that part of the order which prohibited attendance at the depositions, asserting a qualified right to attend based on constitutional provisions, common law precedent, and the language of relevant court rules. Another hearing was held, and again neither the state nor the defense offered any evidence in support of closure. Instead, they argued that no reason, let alone "good cause," need be presented to

deny the press access to the depositions. On February 28, 1983, Judge Burk not only denied the motion, he rescinded that part of his earlier order which required the release of all deposition transcripts not specifically ordered sealed. A. 55-57.

The press immediately petitioned for review of this order in the appellate court. On June 11, 1985, more than two years after appellate argument to a three-judge panel, the Fourth District Court of Appeal rendered a fragmented 5-4 *en banc* decision. A. 23-54. Writing five separate opinions, a bare majority ruled the press had *no* right of access to depositions or unfiled transcripts. However, the court certified two questions to the Supreme Court of Florida for resolution as being of "great public importance":

> 1. Is the press entitled to notice and the opportunity and right to attend pretrial discovery depositions in a criminal case?
>
> 2. Is the press entitled to access to pretrial discovery depositions in a criminal case which may or may not have been transcribed but which have not been filed with the clerk of court or the judge?

A. 41.

The Florida Supreme Court immediately accepted jurisdiction. On February 19, 1987, again after almost two years of deliberation, a bare majority affirmed the decision of the Fourth District Court of Appeal, 4-1.[8]

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8. The term "bare majority" is used advisedly. Under Florida law, a majority of the court must consist of at least four justices. Due to the court's extraordinary delay in rendering its decision, only four justices remained on the court who had

(Continued on following page)

A. 2-20. Relying on a purported interpretation of this Court's decision in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), the Florida court held that "the press does not have a first amendment right . . . to obtain copies of depositions which are not filed with the court."[9] A. 11. The court explicitly acknowledged the factual differences between *Seattle Times* and the case before it but nonetheless held:

> [W]e believe the rationale of *Seattle Times* is applicable to criminal prosecutions and to the issue of access by non-parties to discovery proceedings and is consistent with *Gannett*, *Richmond Newspapers*, *Press-Enterprise I*, *Waller*, and *Press-Enterprise II*.

A. 12.

The court explicitly rejected the straightforward application of the *Seattle Times* rationale made by the press petitioners, that parties seeking to limit public access to unfiled discovery materials must show "good cause" and obtain a protective order to do so. Instead, the court interpreted *Seattle Times* to hold that the public and press

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Footnote continued—

participated in the oral argument and reviewed the briefs. One of these justices chose to dissent. To obtain a majority, retired Justice Adkins, who had been on the court at the time of argument, joined the majority. None of the three justices who had joined the Court after argument, but prior to issuance of this decision, participated. Justice Barkett recused herself because she had dissented from the *en banc* decision of the Fourth District.

9. The Florida Supreme Court also held that the press enjoys no qualified right to *attend* discovery depositions taken in criminal cases. The Miami Herald seeks no review of this holding in this petition. Consequently, the concerns expressed in the *Burk* opinion regarding the inability of parties to anticipate testimony given at discovery depositions are not relevant to this petition, since a motion to limit access to a deposition transcript requires no predictive skills.

have no right of access to such discovery materials, regardless of whether the action is civil or criminal, or whether "good cause" exists for the denial:

> In our view, *Seattle Times* furnishes guidance applicable to the case at hand. Properly read, the defendant Seattle Times should be regarded as wearing two hats. In its role as defendant, it was entitled to the liberal discovery right of a party.
>
> * * *
>
> In its role as a newspaper, the Seattle Times was treated as a non-party to the suit and had no independent constitutional right to have access to the discovery process or to use the information which it discovered in its role as a party. Essentially, the protective order denied Seattle Times, in its role as a newspaper, access to the discovery process.
>
> Petitioners cite *Seattle Times* for the proposition that parties who wish to deny access to a deposition proceeding should be required to obtain a protective order. We disagree. Because the Seattle Times was treated as both a party and a non-party and thus had access to information which it discovered as a party, it was necessary for the trial court to issue a protective order. Absent its party status Seattle Times was accorded no independent first amendment right to the discovery process or to discovered information. Given this holding, we do not see how it can be plausibly argued that the press has a first amendment right to be present at deposition proceedings or to obtain access to such depositions prior to their being introduced at trial or become the subject of a suppression hearing.

A. 13-14.

All motions for rehearing were denied on April 21, 1987.

B. Miami Herald Publishing Company v. Hagler

John Hagler ("Hagler") was arrested in Riviera Beach, Florida, in the course of a major undercover "sting" operation and charged with possession and sale of one-half gram of cocaine to a police informant. Pursuant to Rule 3.220, Florida Rules of Criminal Procedure, Hagler's counsel took the deposition of the informant. No one objected and the press attended without incident.

At the deposition, the informant testified that prior to selling him the cocaine, Hagler had offered to sell him pictures of Palm Beach County State Attorney David Bludworth and an unidentified woman. Hagler explained that the pictures could be used as "bargaining chips" to influence Bludworth, who was then campaigning for the United States Senate.

On August 1, 1983, Hagler's counsel noticed the deposition of the state attorney for August 16, and, on August 4, a subpoena was served on Bludworth. On August 15, the press learned that the deposition had been cancelled. Hagler's counsel advised the press that he had reached an agreement with the state attorney not to reveal when or where the deposition would be rescheduled. Thus on August 29, 1983, the deposition of David Bludworth was taken in secret. No amended notice of deposition was filed, and no protective order was sought or obtained.

Shortly thereafter, on September 1, 1983, the press filed a motion seeking an order allowing them access to the transcript of the Bludworth deposition and requiring all future depositions in the case to be held in the open. On September 6, Judge Harper orally denied the motion.

The press moved for reconsideration and this too was denied, by written order dated September 12, 1983. A. 74-83.

Thereafter, on September 27, 1983, the press sought emergency review of the order in the Fourth District Court of Appeal.[10] And, on June 26, 1985, a panel of the court ultimately affirmed Judge Harper's order denying access to the transcript of the state attorney's secret deposition. A. 72-73. The panel relied solely on the recent *en banc* decision in *Burk*.

The press petitioners timely sought review of the Fourth District decision in the Supreme Court of Florida, which accepted jurisdiction on January 21, 1986. On May 7, 1987, the Supreme Court of Florida summarily denied the petition for review, holding that its recent decision in *Burk* "obviate[d] jurisdiction." A. 70-71.

C. Miami Herald Publishing Company v. State

Dr. John Freund and John Trent were charged with first-degree murder in connection with the death of Ralph Walker in July, 1984. Defense counsel for Freund and Trent noticed the depositions of four state witnesses for January 30, 1985, pursuant to Rule 3.220, Florida Rules of Criminal Procedure. Members of the press appeared for the depositions.

Before testimony could begin, however, the assistant state attorney handling the case objected to the presence of the press. He indicated that if the press stayed, he would instruct the witness not to answer. Defense counsel, however, objected to "clos[ing] the doors and pro-

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10. While the appeal was pending, Hagler pled guilty and was convicted of the charge of selling cocaine. Sentence was withheld pending Hagler's successful completion of three years probation. Thereafter, on December 13, 1983, Hagler voluntarily released the transcript of the Bludworth deposition to the press.

ceed[ing] without the press." They insisted that the depositions proceed with the press in attendance. Ultimately, the assistant state attorney announced his intention to seek a protective order and the deposition was suspended. A. 92.

That afternoon, the state moved for a protective order and the defendants moved to compel the state to proceed with discovery. A hearing was held before Judge Mounts during which the state conceded that it had no factual basis for its claim that press coverage would frighten its witnesses. Judge Mounts recessed the hearing to permit the parties to brief their arguments. On February 15, 1983, a second hearing was held. Again, the state offered no evidence in support of closure, and counsel for defendant Trent repeated his "object[ion] to the press being excluded from these depositions." A. 92.

On February 22, 1985, Judge Mounts entered an order denying the state's motion, and noting that the state had failed to offer any reasons why the press should be excluded from the depositions. A. 91-94. The depositions in the case continued to be taken with the press in attendance.

On March 21, 1985, the state petitioned the Fourth District Court of Appeal for review of Judge Mounts' order. Neither defendant filed a brief. On July 31, 1985, a panel of the court summarily reversed the trial court. A. 88-90. The panel relied solely on the recent *en banc* decision in *Burk*.

The press timely sought review of the Fourth District decision in the Florida Supreme Court, which granted review on February 7, 1986. On May 7, 1987, the Supreme Court of Florida summarily denied the petition for review, holding that its recent decision in *Burk* "obviate[d] jurisdiction." A. 86-87.

REASONS FOR GRANTING THE WRIT

I.

Three years ago, in *Seattle Times Co. v. Rhinehart, supra,* this Court first addressed the relationship between First Amendment rights and court rules authorizing protective orders restricting civil litigants' dissemination of information obtained solely through the use of judicial discovery procedures. The decision wrought a delicate balancing of the state's interest in preventing discovery abuses and facilitating the efficient litigation of civil disputes on one hand, and the free speech interests of litigants on the other.

The Court was careful to note that the protective order under review had been entered for "good cause," in accordance with the state rules of procedure. The plaintiff Aquarian Foundation had made a strong evidentiary showing that the protective order should be entered to preserve the anonymity, and thereby the important privacy and First Amendment rights, of its members and contributors. Filed affidavits showed that the unpopularity of the Aquarian sect had subjected known members to vandalism and retaliation for their beliefs. The trial court permitted discovery into these matters, but found "good cause" to limit the defendant's right to disclose this highly protected information obtained solely through the judicial process. This Court concluded that court rules providing for such protective orders upon a showing of "good cause" do not violate the First Amendment because they serve a substantial governmental interest unrelated to the suppression of speech and are appropriately tailored to protect that interest.

In the years since *Seattle Times*, the state and lower federal courts have attempted to apply its teachings in a variety of contexts that are greatly removed from the narrow case of gratuitous disclosure of highly protected confidential information obtained by a civil litigant through court-ordered discovery. The cases often concern criminal prosecutions, not civil litigation. They therefore raise important issues unrelated to the manner in which private disputes are litigated in the courts. Even more troubling, the cases very frequently involve the public's right to monitor and understand our system of civil and criminal justice rather than a party's self-interested desire to disseminate irrelevant private information obtained through discovery.

More technical distinctions are also found in the cases. Access claims may involve either filed or unfiled materials, and the access right may be asserted both post-judgment and pre-judgment. *See, e.g., In re Reporters' Committee for Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985) (no First Amendment right of access *prejudgment* to civil discovery documents filed with the court). The grounds recognized for the qualified access right have included the common law, court rules, state constitutional provisions, and the First Amendment.

Efforts to apply *Seattle Times* to these cases have been problematic since the case involved neither an access claim, nor a criminal prosecution. *See Reporters' Committee*, 773 F.2d at 1331 (*Seattle Times* is "more remote in that it did not invoke a claim by the public to *access*, but rather a claim by one of the parties to *disseminate* information acquired in the course of pretrial discovery") (Scalia, J.). The materials which were the subject of the protective order in *Seattle Times* were not filed with the court, and the right to disseminate them gratuitously was restricted prior to entry of judgment.

The Florida Supreme Court's opinion is the most far-reaching limitation of the public's First Amendment right of access to be based on *Seattle Times*. The Florida court squarely held that its "conclusion that the press does not have a first amendment right . . . to obtain copies of depositions which are not filed with the court finds support in *Seattle Times Co. v. Rhinehart.*" A. 11 (citation omitted). Relying on *Seattle Times* to "furnish[ ] guidance," A. 13, the Florida Supreme Court held that the press and public have absolutely no right of access to unfiled deposition transcripts, irrespective of whether "good cause" for closure is alleged (much less shown), whether the defendant objects to the denial of public access, or even whether judgment has been entered in the case. In short, the Florida court expressly attributed its expansive holding to the opinion of this Court in *Seattle Times*.

The crux of the *Burk* opinion is the Florida court's assertion that as a *party litigant*, the Seattle Times was allowed discovery into the Aquarian Foundation's confidential information, but that "as a newspaper, the Seattle Times was treated as a non-party to the suit and had no independent constitutional right to have access to the discovery process." A. 13.

The flaws in this reading of *Seattle Times* are apparent. This Court's opinion nowhere states or implies that the press and public have no right to monitor the criminal discovery process, and it nowhere holds or suggests that the Seattle Times' rights were solely those of a litigant. The order affirmed in *Seattle Times*, by its express terms, *did not limit public access to information relevant to litigation of the case.* The Court's careful balancing of interests has been converted by the Florida court into a *per se* rule of closure which finds no support in the actual language of the opinion, and is clearly con-

trary to its rationale. The *per se Burk* closure rule, unlimited in scope or duration, serves no interest unrelated to the suppression of speech and is not narrowly drawn to serve a substantial governmental interest.

If the *Burk* rule were the isolated decision of a single state court, guidance from the Court on this issue would be of "great public importance" only to the people of Florida. However, the *Burk* rule has been explicitly followed by the highest state courts of both Michigan and Arizona. *Booth Newspapers, Inc. v. Midland Circuit Judge,* 145 Mich.App. 396, 377 N.W.2d 868 (Mich.Ct. App. 1985), *leave to appeal denied,* 425 Mich. 854 (Mich. 1986), *cert. denied,* 107 S.Ct. 877 (1987) (no standing); *Lewis R. Pyle Memorial Hospital v. Superior Court,* 149 Ariz. 193, 717 P.2d 872, 876 (Ariz. 1986) (citing *Burk*). And the position of these courts is analogous to that of the Tenth Circuit Court of Appeals which has held the press has no standing to seek access to unfiled civil discovery materials. *Oklahoma Hospital Association v. Oklahoma Publishing Co.,* 748 F.2d 1421 (10th Cir. 1984), *cert. denied,* 473 U.S. 905 (1985).

These decisions, however, conflict with opinions of many other important appellate tribunals. For example, the Rhode Island Supreme Court has decided that the press enjoys a qualified First Amendment right of access to discovery materials produced in a state criminal action. *See State v. Cianci,* 496 A.2d 139, 144-45 (R.I. 1985). At least six United States Circuit Courts of Appeals have construed *Seattle Times* to hold that third parties do enjoy a qualified access right to discovery materials, although their rationales and the circumstances of their decisions vary. Some of these cases involve the public's right to monitor some of the most important "public law"

cases of this era. *In re "Agent Orange" Product Liability Litigation,* 821 F.2d 139 (2d Cir. 1987) (requiring "good cause" to maintain seal on civil discovery documents designated "confidential" pursuant to blanket protective order in Vietnam veterans' suit for injuries caused by "Agent Orange" chemicals); *In re Alexander Grant & Co. Litigation,* 820 F.2d 352 (11th Cir. 1987) (requiring "good cause" to prevent press access to unfiled discovery documents in suit concerning massive fraud by government securities broker); *Anderson v. Cryovac, Inc.,* 805 F.2d 1 (1st Cir. 1986) (requiring "good cause" to seal civil discovery documents submitted to the court in support of motions in toxic waste case); *Cipollone v. Liggett Group, Inc.,* 785 F.2d 1108 (3d Cir. 1986) (requiring "good cause" to seal non-confidential civil discovery documents in products liability case against tobacco companies); *Worrell Newspapers of Indiana, Inc. v. Westhafer,* 739 F.2d 1219, 1223 n.4 (7th Cir. 1984) (reciting that *Seattle Times* permits the entry of a protective order for "good cause" shown in the context of pretrial civil discovery); *Tavoulareas v. Washington Post Co.,* 737 F.2d 1170, 1172-73 (D.C. Cir. 1984) (remanding for determination of whether the continuation post-judgment of a protective order sealing deposition transcripts is supported by "good cause"); *United States v. Smith,* 602 F.Supp. 388 (M.D. Pa. 1985), *aff'd,* 776 F.2d 1104 (3d Cir. 1985) (requiring "good cause" to restrict public access to a bill of particulars deemed to be criminal discovery). *See generally* D. Paul and R. Ovelmen, "Access," in Communications Law 1986, 740-58 780-808 (PLI 1986) (collecting additional conflicting cases).

In fact, journalists in Florida face this conflict squarely every day in trying to cover judicial proceedings in the state and federal courts. As a consequence of the decisions of the Eleventh Circuit in *Alexander Grant* and the Florida

Supreme Court in *Burk*, *Hagler*, and *State*, the press enjoys a qualified right of access to discovery materials produced in federal court, but no similar right in state civil or criminal actions.

This Court can provide critically needed guidance on the application of *Seattle Times* to public access claims in criminal cases and in so doing resolve the conflicts among the many cases addressing the public's right to monitor the discovery process.

II.

In a series of decisions culminating in *Press-Enterprise II*,[11] this Court has developed the contours of a qualified First Amendment right of access. In a sweeping departure from these fundamental First Amendment precedents, the Florida Supreme Court has abandoned the central access teachings of this Court and thereby deprived the people of Florida of a crucial source of information about their criminal justice system.

In considering whether the First Amendment right of access applies to particular judicial records or proceedings, this Court has looked to two complementary considerations. "First, because a tradition of accessibility implies the favorable judgment of experience," the Court has "considered whether the place and process has been open to the press and general public." *Press-Enterprise II*, 106 S.Ct. at 2740. Second, the Court has "considered whether public access plays a significant positive role in the functioning of the particular process in question." *Id.*

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11. *Waller v. Georgia*, 467 U.S. 39 (1984); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (*"Press-Enterprise I"*); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (*"Globe Newspaper"*); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (*"Richmond Newspapers"*); *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

The Florida Supreme Court addressed neither issue. Instead of considering Florida's actual experience with unsealed criminal deposition transcripts, the court simply recited dicta from *Seattle Times* stating that "deposition proceedings are not public components of a *civil trial.*" A. 13 (citation omitted) (emphasis added). That Florida *never had* a rule against public access to *criminal depositions,* and that the press had actually attended many criminal depositions since the inception of the discovery rules, were facts of no import to the court.[12]

Similarly, the *Burk* court never considered the structural importance of public access to the criminal deposition process. Such access is crucial for the public to understand Florida's criminal justice system, a system in which depositions provide the sole source of sworn testimony in the vast majority of criminal cases since fewer than 3% of such cases go to public trial. The court offered no assessment of the need for access in these cases, or of

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12. Whether discovery proceedings have historically been closed to the public is an issue that deserves far greater attention from this Court. Substantial historical evidence exists that depositions under the common law, although rare, did occur and were open to the public at the discretion of the presiding magistrate or "Examiner," not of the parties. Daniell, Chancery Pleading and Practice, Vol. I, 906 (6th Am. Ed. 1894) ("The Examiner has power to admit or exclude the public, as he thinks fit."); *Wright v. Wilkin,* 4 Jur.N.S. 804, 805 (1885) ("As to the public or the short-hand writer, I think the examiner has power to do just as he thinks fit; if he imagines that he is precluded from admitting any persons except the parties, their legal advisers, and the witnesses, I think he is not right."). The Daniell treatise was followed in the leading Florida treatise on the subject. R.H. Armstrong and W.P. Donahue, Florida Chancery Jurisprudence § 334 (1927) ("The examination of witnesses may be conducted in public or private, as the officer may determine."). By statutory mandate, Florida courts of the period were required to observe English practice where, as here, Florida and federal rules were silent. Act of Nov. 7, 1828, § 35 (1881); *Long v. Anderson,* 48 Fla. 27, 37 So. 216, 219 (1904).

But see Reporters' Committee, supra.

the public benefit that access to the deposition process would provide. Consequently, the Florida court departed from this Court's access tenets in at least three fundamental ways.

First, it is clear, and it was argued, that each of the First Amendment interests supporting access to criminal trials identified by this Court in *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980), apply with equal force to access to unfiled deposition transcripts in Florida's largely pretrial criminal justice system. Each of the interests served by access to trials—"fairness," "the perception of fairness," "public understanding of the rule of law" and the case at hand, the "community therapeutic value" of observing the process, the deterrence of wrongdoing, and the communication of information relevant to informed discussion of the system; *id.* at 570-73—is served by access to criminal depositions. Indeed, the interests served by access to trials can *only* be served by access to criminal depositions in Florida, since the deposition often provides the only meaningful avenue of public access to the process. Criminal depositions frequently form the only evidentiary predicate for dismissals, plea bargains, *nolle prosequi,* and guilty pleas. As this Court recognized in relation to California's preliminary hearing in *Press-Enterprise II,* a procedure which provides "the sole occasion for public observation of the criminal system" must be open to public view. *Press-Enterprise II,* 106 S.Ct. at 2743, *quoting, Richmond Newspapers,* 448 U.S. at 572.

In addition, the *Burk* rule raises serious Sixth Amendment concerns. As the Court noted in *Press-Enterprise II,* "[t]he right to an open trial is a shared right of the accused and the public, the common concern being the assurance of fairness." *Press-Enterprise II,* 106 S.Ct. at

2740; *see Waller v. Georgia*, 467 U.S. 39 (1984). It is at this juncture that the Sixth Amendment rights of the criminal defendant and the First Amendment rights of the public are coextensive. The *Waller* Court observed that the need for open suppression hearings "may be particularly strong" because "[a] challenge to the seizure of evidence frequently attacks the conduct of police and prosecutor." 467 U.S. at 47. The *Burk* rule, because it grants the prosecution the power to close an unfiled deposition even when the defendant objects, as he did in *State*, presents a clear threat to the fundamental constitutional rights of both criminal defendants and the public.

Finally, the Florida Supreme Court has judicially created a rule against access which is as absolute as the mandatory closure statute invalidated by this Court in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (*"Globe Newspaper"*). This Court has consistently stated the adjudication of access claims requires a rule which will accommodate competing interests; consequently, *per se* or mandatory closure rules are inappropriate. As the Court noted in *Globe Newspaper, supra*, at 608, even a "compelling" interest "does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest." The locus of authority to make decisions regarding access is the trial judge who must articulate specific findings to support closure on a case-by-case basis; it is not the parties acting in their own narrow self-interest. *Id.* Moreover, particular closure orders must be narrowly tailored to serve compelling or overriding state interests. *Press-Enterprise II*, 106 S.Ct. at 2743; *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (*"Press-Enterprise I"*); *Globe Newspaper*, 457 U.S. at 606-07.

The *Burk* rule satisfies none of these requirements. It is an absolute *per se* rule which does not permit the accommodation of competing interests. The traditional authority of the trial court to decide public access claims is replaced by the whim of a single party. No compelling state interest was presented to justify the imposition of this *per se* closure rule. That *some* depositions may contain particular private or prejudicial information does not justify a rule that seals *all* unfiled depositions irrespective of whether they contain any sensitive information. Similarly, the fact that a deposition's premature disclosure may prejudice a defendant's fair trial rights fails to support a closure rule which imposes a seal that cannot be broken, even after disposition of the case. *See Press-Enterprise I*, 464 U.S. at 512.

CONCLUSION

Whether considered in light of *Seattle Times* or this Court's First Amendment access cases, the decision of the Florida Supreme Court is in error and signals the widespread need for guidance by this Court. The issues presented below were certified to be of "great public importance" to the people of Florida. They received *en banc* consideration by two different intermediate Florida appellate courts as well as by the Florida Supreme Court.[13] After years of deliberation, bare ma-

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13. The Third District Court of Appeal also considered the question addressed in *Burk en banc*. *Estrada v. Snyder*, Case No. 86-767 (Fla. 3d Dist. Ct. App. 1986). The judges in that court split 7-2 *in favor* of recognizing a qualified right of access. The Third District likewise certified the question to the Florida Supreme Court. In the wake of *Burk*, however, the Florida Supreme Court declined jurisdiction. *Miami Herald Publishing Co. v. Estrada*, Case No. 68,625 (Fla. 1987).

(Continued on following page)

jorities emerged to issue the highly controversial opinion which is the subject of this petition. During this period, the people of Florida have been deprived of crucial information concerning their criminal justice system. Not only have Florida judges issued conflicting opinions, but the rule of *Burk* has been both followed and contradicted in cases throughout the country. In light of the significance of this issue, and the pronounced conflicts among the circuits in deciding it, we respectfully submit that this Petition for a Writ of Certiorari be granted.

DATED: Miami, Florida
September 4, 1987

Respectfully submitted,

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Footnote continued—

While *Burk* was pending in the Fourth District, a unanimous panel of the Second District Court of Appeal also affirmed the qualified right of access to criminal depositions applying the "good cause" standard. *Short v. Gaylord Broadcasting Co.*, 462 So.2d 591 (Fla. 2d Dist. Ct. App. 1985).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the Petition for Writ of Certiorari in this case was originally served on September 4, 1987, and that the foregoing corrected Petition for Writ of Certiorari was served on September 25, 1987, in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States by depositing three true copies in a United States post office or mailbox, with first-class postage prepaid, addressed to:

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In the Supreme Court of the United States

OCTOBER TERM, 1987

PALM BEACH NEWSPAPERS, INC., and THE MIAMI HERALD PUBLISHING COMPANY,
Petitioners,

vs.

THE HONORABLE RICHARD BRYAN BURK, LINDA AURILIO, and THE STATE OF FLORIDA,
Respondents.

THE MIAMI HERALD PUBLISHING COMPANY and PALM BEACH NEWSPAPERS, INC.,
Petitioners,

vs.

JOHN W. HAGLER and THE STATE OF FLORIDA,
Respondents.

PALM BEACH NEWSPAPERS, INC. and THE MIAMI HERALD PUBLISHING COMPANY,
Petitioners,

vs.

THE STATE OF FLORIDA,
Respondent.

JOINT APPENDIX OF PETITIONERS PALM BEACH NEWSPAPERS, INC. AND THE MIAMI HERALD PUBLISHING COMPANY

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Order (February 28, 1983)

Order (February 11, 1983)

Order (January 18, 1983)

Order (December 8, 1982)

PALM BEACH NEWSPAPERS, INC.; The Miami Herald Publishing Company; and News and Sun Sentinel Company, Petitioners,

v.

The Honorable Richard Bryan BURK, Linda Aurilio and State of Florida,
Respondents.

No. 67352.

Supreme Court of Florida.

Feb. 19, 1987.

Rehearing Denied April 21, 1987.

The press sought to be present at pretrial discovery depositions and to obtain copies of depositions in attempted murder case. The Circuit Court, Palm Beach County, Richard B. Burk, J., held that press was not entitled to access, and press petitioned for review. The District Court of Appeal, 471 So.2d 571, affirmed, and certified questions of great public importance. The Supreme Court held that the press does not have a qualified right under the First Amendment, under rules of criminal and civil procedure, or under the Public Records Law to attend pretrial discovery depositions in a criminal case or to obtain copies of unfiled depositions.

Questions answered and decision approved.

Shaw, J., filed opinion concurring in part and dissenting in part.

1. Criminal Law (Key) 635

Where defendant's right to a fair trial conflicts with the public's right of access, it is the right of access which must yield. U.S.C.A. Const.Amends. 1, 5, 6, 14.

2. Criminal Law (Key) 635

While defendant generally may compel a public trial, there is no similar right to a private trial. U.S.C.A. Const. Amend. 6.

3. Constitutional Law (Key) 90.1(3)

The press does not have a First Amendment right to be present at discovery depositions in a criminal proceeding or to obtain copies of depositions which have not been filed with the court. U.S.C.A. Const.Amend. 1.

4. Criminal Law (Key) 635

Parties to a criminal proceeding who wish to deny access of the press to a deposition proceeding are not required to obtain a protective order.

5. Criminal Law (Key) 635
Records (Key) 32

The press does not have a qualified right under the rules of criminal and civil procedure to attend deposition proceedings in criminal cases and to obtain copies of unfiled depositions. West's F.S.A. RCP Rule 1.300(c): West's F.S.A. RCrP Rule 3.220(d).

6. Records (Key) 54

The press does not have any right under the Public Records Law to obtain copies of unfiled depositions in

criminal proceedings. West's F.S.A. §§ 119.01 et seq., 119.07.

7. Records (Key) 32

Once a transcribed deposition is filed with court pursuant to criminal rule, it is open to public inspection. West's F.S.A. RCrP Rule 1.400.

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PER CURIAM.

We review *Palm Beach Newspapers, Inc. v. Burk*, 471 So.2d 571 (Fla. 4th DCA 1985), wherein over the objection of both the prosecutor and the accused, petitioners (the press) sought to be present at pretrial discovery depositions and to obtain copies of depositions

which had not been transcribed or filed with the trial court. The trial judge ruled, essentially, that the taking of depositions was not a judicial proceeding and there was no right of access by the public or press until such depositions were filed with the court. On appeal, the district court (en banc) held that the press has no constitutional, first amendment, right of access to the taking of pretrial depositions in a criminal case and the right of access to depositions did not accrue until they were filed with the clerk of the court. On its own motion, the district court certified two questions of great public importance:

> 1. IS THE PRESS ENTITLED TO NOTICE AND THE OPPORTUNITY AND RIGHT TO ATTEND PRETRIAL DISCOVERY DEPOSITIONS IN A CRIMINAL CASE?
>
> 2. IS THE PRESS ENTITLED TO ACCESS TO PRETRIAL DISCOVERY DEPOSITIONS IN A CRIMINAL CASE WHICH MAY OR MAY NOT HAVE BEEN TRANSCRIBED BUT WHICH HAVE NOT BEEN FILED WITH THE CLERK OF COURT OR THE JUDGE?

Id. at 579. We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. We answer both questions in the negative, and approve the decision of the district court below.

We have reviewed and considered briefs from the three petitioners, an amicus curiae brief from the Times Publishing Company in support of petitioners, and answer briefs from respondents. All together, the briefs and appendices comprise hundreds of pages. We do not consider it necessary or desirable to address every point raised in support of the opposing views, but have identified three critical points worthy of comment:

1. Does the press have a qualified right under the first amendment to the United States Constitution to attend pretrial discovery depositions and to obtain copies of unfiled depositions?

2. Does the press have a qualified right under Florida rules of discovery to attend pretrial discovery depositions and to obtain copies of unfiled depositions?

3. Does the press have a qualified right to obtain copies of unfiled depositions under section 119.07, Florida Statutes (1985)?

Petitioners cite a series of opinions from the United States Supreme Court and this Court, the rationale of which, petitioners urge, supports the broad proposition that under the United States Constitution criminal pretrial proceedings are presumptively open to the public. Consequently, petitioners urge, the press may not be barred unless there is a showing of an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. Petitioners acknowledge that none of the cases, with one exception, dealt with the discovery process but argue by analogy that access to pretrial discovery is critical to freedom of the press because an overwhelming majority of criminal prosecutions are resolved pretrial. Without such access, petitioners urge, the public will be denied critical information on the criminal justice system. In essence, petitioners are asking that public access to criminal trials be expanded to include the criminal discovery process. For the reasons which follow we decline to do so.

The question of public access to pretrial criminal proceedings directly implicates a variety of constitutional

rights: the due process right to a fair trial under the fifth and fourteenth amendments; the rights to a speedy and public trial by an impartial jury in the venue where the crime was allegedly committed under the sixth amendment; the rights of the public and press under the first amendment; and the privacy rights of the accused and other trial participants under the first amendment and article I, section 23 of the Florida Constitution. It also implicates the state's interest in inhibiting disclosure of sensitive information and the right of the public to a judicial system which effectively and speedily prosecutes criminal activities. It is the balance between these rights which is at issue. The United States Supreme Court has addressed the relationship between these various constitutional provisions as they apply to specific stages of criminal proceedings. For our frame of reference, we now turn to this body of case law.

In *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979), the accused, with the acquiescence of the state, persuaded the trial court to deny press and public access to a pretrial suppression hearing because the buildup of adverse publicity jeopardized the defendant's right to a fair trial. On review, the Court acknowledged that the sixth amendment permits and presumes open trials as a norm, but "there exists no persuasive evidence that at common law members of the public had any right to attend pretrial proceedings; indeed, there is substantial evidence to the contrary." *Id.* at 387, 99 S.Ct. at 2909. This was so, the Court reasoned, because public access to pretrial proceedings may pose a hazard to the fairness of the trial and, under the sixth amendment, public trials were clearly associated with the protection of the accused, not with an independent right of the public to attend trials. The Court declined to decide

whether there was a first and fourteenth amendment right to attend criminal trials. Instead, the Court assumed, arguendo, that there was such a right and held that the trial court, under the circumstances of the case, had properly balanced the right of the accused to a fair trial against the right of the press and public to have access to pretrial proceedings.

[1, 2] It is clear from *Gannett* that where a defendant's right to a fair trial conflicts with the public's right of access, it is the right of access which must yield. *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980), makes clear, however, that while a defendant, generally, may compel a public trial, there is no similar right to a private trial. There, the accused, with the concurrence of the state, succeeded in closing the trial itself. The United States Supreme Court recognized that there was no explicit constitutional provision that the public had a right to attend trials. Nevertheless, because of the common law history of public access to trials and the importance of such access to the commonwealth, the Court held

> that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and "of the press could be eviscerated." *Branzburg,* [*v. Hayes*], 408 U.S., [665] at 681, 92 S.Ct., [2646] at 2656 [33 L.Ed.2d 626 (1972)].

Id. at 580, 100 S.Ct. at 2829, footnote omitted.

In *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (*Press-Enterprise I*), the trial court closed six weeks of jury voir

dire and refused press requests for a transcript of the jury selection proceedings. The purported reasons for closure were the right of the defendant to a fair trial and the right of the prospective jurors to privacy. The United States Supreme Court noted that jury selection had been presumptively open to the public in England and in Colonial America when the Constitution was adopted. Thus, the Court reasoned, open jury selection was a component of an open trial which

> enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

Id. at 508, 104 S.Ct. at 823. The Court held that it was error to close the proceedings and totally suppress the transcript because there were no findings that the right to a fair trial and privacy interest were threatened and there was a failure to consider alternatives to closure of the jury selection and suppression of the transcript.

In *Waller v. Georgia,* 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), the trial court closed a pretrial suppression hearing over the objection of the accused. The United States Supreme Court reasoned that suppression hearings often resemble a bench trial and often are as important, if not more so, than the trial itself. Moreover, because motions to suppress often challenge the conduct of the police and prosecutor, the "public in general also has a strong interest in exposing . . . police misconduct." *Id.* at 47, 104 S.Ct. at 2216. Although *Waller* did not present the issue of the public's right of access to suppression hearings, the Court noted that in *Gannett* "a majority of the Justices concluded that the public had a qualified constitutional right to attend such hearings." *Waller,* 467 U.S. at 45, 104 S.Ct. at 2215. Accordingly, the Court held that under the

sixth amendment any closure of suppression hearings over the objection of the accused must be justified by a showing under the *Press-Enterprise I* test of "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise I,* 464 U.S. at 510, 104 S.Ct. at 824.

In *Press-Enterprise Co. v. Superior Court,* ..... U.S. ....., 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) (*Press-Enterprise II*), at the request of the accused, the trial court closed a forty-one day preliminary hearing wherein the state presented evidence of probable cause. Over the objection of the state and the press, the trial court also sealed the record of the hearing. The trial court ruling was upheld by the California Supreme Court on the grounds there was no general first amendment right of access to preliminary hearings and that closure of the hearing and sealing of the record was necessary because of a reasonable likelihood of substantial prejudice impinging upon the right to a fair trial. On review, the United States Supreme Court reversed, concluding that the first amendment right of access to criminal trials was applicable to preliminary hearings as conducted in California. This was so, the court reasoned, because open preliminary hearings have been the near uniform practice in both federal and state courts and because preliminary hearings on probable cause as conducted in California are essential to the proper functioning of the criminal justice system. On the latter point, the Court noted the elaborateness of the California preliminary hearing, its similarities to a trial, the fact that it was often the final, most important step in a criminal proceeding, and was often the only opportunity for public access to the proceeding.

Petitioners also rely on the decisions of this Court in *Miami Herald Publishing Co. v. Lewis,* 426 So.2d 1 (Fla.

1982), and *State ex rel. Miami Herald Publishing Co. v. McIntosh,* 340 So.2d 904 (Fla.1976). In *McIntosh,* the trial court entered a classic prior restraint order prohibiting the publication of any evidence which had not been presented in open court in the presence of the jury. Relying heavily on *Nebraska Press Association v. Stuart,* 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), we held that the order was invalid. In *Lewis,* relying on *Gannett* and *Richmond,* we held there was no first amendment right "to attend pretrial suppression hearings as distinguished from the right to attend a criminal trial." *Lewis,* 426 So.2d at 6.[1] Nevertheless, because of our concern for open government and our belief that public access was an important part of the criminal justice system, we recognized a non-constitutional right of access and established a three-pronged test to balance the need for public access to a pretrial suppression hearing against the paramount right of the accused to a fair trial. Essentially, the test established a presumption of openness and placed the burden on those seeking closure to show that closure of the hearing was necessary. Neither *Lewis* nor *McIntosh* suggests that discovery depositions should be open to the public as a component of a criminal trial.

[3] Having established a proper frame of reference, we now focus on the press's right of access to discovery depositions. Our conclusion that the press does not have a first amendment right to be present at discovery depositions or to obtain copies of depositions which are not filed with the court finds support in *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984).

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1. Dicta in the later *Waller* case indicated a majority of the members of the court in *Gannett* had individually expressed the view that the public had a qualified constitutional right to attend pretrial suppression hearings. These individual views appear to have coalesced in *Press Enterprise II.*

In *Seattle Times,* Rhinehart brought a defamation action against, inter alia, the Seattle Times. The Seattle Times sought extensive discovery which Rhinehart opposed on the grounds that the discovery violated first amendment rights to privacy, freedom of religion, and freedom of association. The trial court granted a motion to compel discovery but also issued a protective order prohibiting the Seattle Times from publishing, disseminating, or using the information in any way except where necessary to prepare for and try the case. The order did not apply to information which the Seattle Times might gather outside the discovery process. On review, the United States Supreme Court upheld the protective order. We appreciate that *Seattle Times,* unlike the present case, involved a civil suit and that it dealt with the validity of a protective order. Nevertheless, we believe the rationale of *Seattle Times* is applicable to criminal prosecutions and to the issue of access by non-parties to discovery proceedings and is consistent with *Gannett, Richmond Newspapers, Press-Enterprise I, Waller,* and *Press-Enterprise II.*

We summarize the rationale of *Seattle Times* as follows. The discovery rights of parties under modern practice is very broad. Discovery may be had on any non-privileged matter which is relevant to the subject matter of the pending action. It is not limited to evidence which will be admissible at trial so long as the information sought is reasonably calculated to lead to the discovery of admissible evidence. There is no distinction drawn between private information and that to which no privacy interests attach. Discovery rules permit extensive intrusion into the affairs of both parties and non-parties and discovery may be judicially compelled. Liberal discovery produces information which may be irrelevant to the trial and which, if publicly released, would be damaging to the reputation

and privacy of both parties and non-parties. The parties are granted discovery rights as a matter of legislative or judicial grace. Non-parties do not possess discovery rights and cannot compel the disclosure of information. There is no independent right outside the trial process to the information sought. Society in general, and the courts specifically, has a substantial interest in preventing abuse of judicially compelled discovery. Deposition proceedings are not public components of a trial unless made so by the parties. Such proceedings were not open to the public at common law and, as a matter of modern practice, are normally conducted in private. Thus, restrictions on discovered information which has not been admitted at trial are not restrictions on a traditionally public source of information.

In our view, *Seattle Times* furnishes guidance applicable to the case at hand. Properly read, the defendant Seattle Times should be regarded as wearing two hats. In its role as defendant, it was entitled to the liberal discovery right of a party. However, "[l]iberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes." 467 U.S. at 34, 104 S.Ct. at 2208. In its role as a newspaper, the Seattle Times was treated as a non-party to the suit and had no independent constitutional right to have access to the discovery process or to use the information which it discovered in its role as a party. Essentially, the protective order denied Seattle Times, in its role as a newspaper, access to the discovery process.

[4] Petitioners cite *Seattle Times* for the proposition that parties who wish to deny access to a deposition proceeding should be required to obtain a protective order. We disagree. Because the Seattle Times was treated as both a party and a non-party and thus had access to in-

formation which it discovered as a party, it was necessary for the trial court to issue a protective order. Absent its party status Seattle Times was accorded no independent first amendment right to the discovery process or to discovered information. Given this holding, we do not see how it can be plausibly argued that the press has a first amendment right to be present at deposition proceedings or to obtain access to such depositions prior to their being introduced at trial or become the subject of a suppression hearing. The "right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk,* 381 U.S. 1, 17, 85 S.Ct. 1271, 1281, 14 L.Ed.2d 179 (1965).

Based on our analysis of the above cases, we are satisfied that there is no affirmative constitutional right on the part of the press to attend deposition proceedings or to have access to depositions prior to their being filed with the court. Petitioners urge, however, that we adopt a more expansive view of the first amendment than is suggested by the case law. We decline. The rationale of *Seattle Times* suggests that public access to discovery information at the moment it is first discovered presents unacceptable hazards to other constitutional rights because of uncertainty as to the nature and content of the information. The purpose of depositions is to develop evidence by discovering what potential witnesses may know about the subject of the trial. It is not possible beforehand to know with any degree of certainty what information will be discovered. In this respect, a deposition proceeding is unlike a pretrial suppression hearing or a preliminary hearing on probable cause where the parties and the court know beforehand what will be discussed. Thus, it is not feasible for a potential witness, for example, to seek a protective order in advance of the deposition and it is too late to do

so if the information becomes public knowledge. The often irrelevant and inadmissible evidence discovered during a deposition has the substantial potential of hazarding the right to a fair trial, the privacy rights of both parties and non-parties, and the right to a trial in the venue of the alleged crime. Aside from the impracticability of seeking protective orders beforehand, seeking such orders "would necessitate burdensome evidentiary findings and could lead to time-consuming interlocutory appeals." *Seattle Times,* 467 U.S. at 36, n. 23, 104 S.Ct. at 2209 n. 23. The effect such a procedure would have on the speedy trial rights of the accused and public is obvious. Moreover, it would not serve the purpose of criminal discovery—assisting in the trial or resolution of criminal charges—and would carry us even farther from the central aim of a criminal trial—trying the accused fairly. We hold there is no first amendment right of public access to criminal deposition proceedings or to unfiled depositions in criminal prosecutions.

[5] Petitioners further urge that, notwithstanding the success or failure of their constitutional argument, they have a qualified right under Florida criminal and civil rules of procedure to attend discovery depositions and to obtain copies of unfiled depositions. Largely for the same reasons as set forth above, we do not agree that the press has a qualified right under the rules of procedure to attend deposition proceedings.

We note that discovery depositions were not permitted until authorized by the rules of criminal procedure. The procedure for taking such depositions is largely controlled by the Florida Rules of Civil Procedure. *See* Fla.R.Crim.P. 3.220(d). The deposition need not be taken before a court reporter or anyone who may be called an officer of the court: "If the parties so stipulate in writing, depositions may be taken before any person at any time or place

upon any notice and in any manner. . . ." Fla.R.Civ.P. 1.300(c). There is nothing in the rules that requires the parties to have a deposition transcribed or to prevent them from agreeing that the person reporting the deposition destroy his or her notes. A deposition is nothing more than a statement of a witness taken under oath in accordance with the rules. As the *Seattle Times* Court said, "[l]iberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes." 467 U.S. at 34, 104 S.Ct. at 2208. Open access would not serve this purpose. The discovery rules are aimed at protecting the rights of the parties involved in the judicial proceeding and of non-parties who are brought into the proceedings because of purported knowledge of the subject matter. Transforming the discovery rules into a major vehicle for obtaining information to be published by the press even though the information might be inadmissible, irrelevant, defamatory or prejudicial would subvert the purpose of discovery and result in the tail wagging the dog.

[6, 7] Finally, petitioners suggest that our commitment to opening the judicial process as enunciated in *Miami Herald Publishing Co. v. Lewis,* 426 So.2d 1 (Fla. 1982), coupled with a "mere reference" to Florida's Public Record's Law, Chapter 119 Florida Statutes (1983), mandates press access to unfiled depositions. We disagree with this contention. As previously discussed we found in *Lewis* that there was no constitutional right of press access to pretrial suppression hearings. Our commitment to opening the judicial process to such hearings was predicated on the fact that suppression hearings were *judicial proceedings* and we, therefore, provided a method for press participation because the public has "a right to know what occurs in the courts." 426 So.2d

at 6-7. Discovery depositions are *judicially compelled* for the purpose of allowing parties to investigate and prepare their case, but, unlike a suppression hearing, they are not judicial proceedings "for the simple reason that there is no judge present, and no rulings nor adjudications of any sort are made by any judicial authority." *Tallahassee Democrat, Inc. v. Willis,* 370 So.2d 867, 872 n. 4 (Fla. 1st DCA 1979). We agree with the holding in *Willis* that once a transcribed deposition is filed with the court pursuant to Rule 1.400 Fla.R.Civ.P., it is open to public inspection. *Id.* at 870-871. *See also Ocala Star Banner Corp. v. Sturgis,* 388 So.2d 1367 (Fla. 5th DCA 1980).

We find nothing in chapter 119 which would point toward the blanket access to unfiled depositions advocated by petitioners.[2] We find that neither chapter 119 nor our commitment to an open judicial process can be applied to unfiled depositions. In addition to the compelling reasons which militated against a constitutional right of access, providing such access would severely undermine our adversarial system. As was aptly stated by the district court below, "a lawyer would be remiss in not making pretrial inquiry of witnesses where he has reason to think that they may have knowledge of some kind concerning the alleged crime." 471 So.2d at 578. Because counsel should be unfettered to explore all matters and depose all witnesses which may be of use in

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2. If, in fact, chapter 119's provisions were intended to encompass all unfiled depositions, serious separation of powers concerns would be raised. *Satz v. Blankenship,* 407 So.2d 396 (Fla. 4th DCA 1981), *review denied,* 413 So.2d 877 (Fla.1982), recognized that, under section 119.011(3)(c)(5), once documents are *required* to be given to an arrested person, the disclosed documents become "public in a sense." 407 So.2d at 398. We find this to be a narrow and specific situation which is in accord with the analysis employed in *Willis.*

his case, the process by which such information is gathered must be as free from chilling influences as possible. Providing access to unfiled depositions under the guise of chapter 119 or our commitment to opening the judicial process would not only present serious constitutional concerns for both the accused and innocent third parties, it would also undermine effective advocacy, as counsel may be inhibited from asking certain questions fearing that damaging or prejudicial information may be published before trial.

Accordingly, we answer the certified questions in the negative and approve the decision of the district court below.

It is so ordered.

McDONALD, C.J., OVERTON and EHRLICH, JJ., and ADKINS, J., (Ret.), concur.

SHAW J., concurs in part and dissents in part with an opinion.

SHAW, Justice, concurring in part and dissenting in part.

I agree almost entirely with the majority opinion. However, for the following reasons, I would hold that reporter notes or unfiled transcriptions of depositions which are available to the accused in a criminal prosecution are public records which are presumptively available for examination or copying under section 119.07(1)(b), Florida Statutes (1985). First, chapter 119 establishes "[i]t is the policy of this state that all state, county, and municipal records shall at all times be open for a personal inspection by any person." § 119.01(1). Second, section 119.011(3)(c)(5) specifically provides, with

exceptions not pertinent here, that documents held by the prosecution which are given, or required by law to be given, to the accused will *not* be exempted from the definition of public records which are subject to examination by any person.* Third, after the deposition is taken, the parties and non-party deponents are aware of the contents of the deposition and are in a position to show cause, if any exists, why a protective order should be issued. Fourth, the trial of the case need not be delayed while the court considers whether to issue a protective order. Fifth, the evidentiary hearing on the protective order should be relatively simple. The balance to be struck is between the rights to a fair trial and privacy, on the one hand, and the statutory right of access to the public record, on the other hand. Sixth, the parties agree that depositions which are filed with the court become a public record subject to public access; Florida Rule of Civil Procedure 1.400; *Tallahassee Democrat, Inc. v. Willis*, 370 So.2d 867 (Fla. 1st DCA 1979). Because Florida Rule of Civil Procedure 1.310(f) does not require that all depositions be transcribed or filed, the district court held that no right of access accrues until there is a filing. For the purposes of defining public records and permitting public access, I agree with Chief Judge Anstead's dissenting comment below that public access should not turn on whether a deposition is transcribed or filed. Once protection against the invasion of the right to a fair trial and privacy are in place. I see no reason why the court reporter's notes or the unfiled transcription should not be treated as a public

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*Florida Rule of Criminal Procedure 3.220 requires that the prosecutor furnish the accused with the names and addresses of all persons known to the prosecutor who have relevant information and with any statements made by those persons.

record, provided the information has been furnished, or should have been furnished, to the defendant pursuant to rule 3.220. Finally, public access to unfiled or untranscribed depositions as outlined above would be supportive of our policy announced in *Miami Herald Publishing Co. v. Lewis,* 426 So.2d 1 (Fla.1982), of opening the judicial process to the public to the maximum degree consistent with decorum and the constitutional rights of the participants.

IN THE SUPREME COURT OF FLORIDA
TUESDAY, APRIL 21, 1987

CASE NO. 67,352
District Court of Appeal,
4th District - No. 83-422

PALM BEACH NEWSPAPERS, INC.; THE MIAMI HERALD PUBLISHING COMPANY; and NEWS AND SUN SENTINEL COMPANY,
Petitioners,

vs.

THE HONORABLE RICHARD BRYAN BURK, LINDA AURILIO and STATE OF FLORIDA,
Respondents.

The motion requesting the full Court to consider petitioner's motion for rehearing filed by Palm Beach Newspapers, Inc. is hereby denied.

McDONALD, C.J., OVERTON, EHRLICH, SHAW, GRIMES and KOGAN, JJ., Concur

The motion requesting the full Court to consider petitioner's motion for rehearing, or in the alternative, for clarification filed by the Miami Herald Publishing Company is hereby denied.

McDONALD, C.J., OVERTON, EHRLICH, SHAW, GRIMES and KOGAN, JJ., Concur

The motion for rehearing filed by Palm Beach Newspapers Inc. is hereby denied.

McDONALD, C.J., OVERTON, EHRLICH, SHAW, JJ., and ADKINS, J. (Ret.), Concur

The motion for rehearing or, in the alternative, for clarification filed by The Miami Herald Publishing Company is hereby denied.

McDONALD, C.J., OVERTON, EHRLICH, SHAW, JJ., and ADKINS, J. (Ret.), Concur

PALM BEACH NEWSPAPERS, INC., and Miami Herald Publishing Company, et al., Petitioners,

v.

The Honorable Richard Bryan BURK, Linda Aurilio and State of Florida,
Respondents.

No. 83-422.

District Court of Appeal of Florida,
Fourth District.

June 11, 1985.

The press sought access to pretrial discovery depositions in attempted murder case. The Circuit Court, Palm Beach County, Richard B. Burk, J., held that the press was not entitled to access, and the press filed petition for review. The District Court of Appeal held that: (1) the press was not entitled to notice and opportunity to attend pretrial discovery depositions in criminal case, and (2) the press was not entitled to access to pretrial discovery depositions taken but not filed with the clerk of court.

Affirmed.

Letts, J., concurred specially and filed opinion.

Anstead, C.J., dissented and filed opinion in which Hurley and Barkett, JJ., joined.

Hurley, J., dissented and filed opinion in which Glickstein and Barkett, JJ., joined.

Glickstein, J., dissented and filed opinion in which Hurley, J., joined.

1. Criminal Law (Key) 635

Press was not entitled to notice and opportunity to attend pretrial discovery depositions in criminal case; declining to follow *Short v. Gaylord,* 462 So.2d 591.

2. Records (Key) 32

Press was not entitled to access to pretrial discovery depositions in criminal case which had been taken but not filed with clerk of court; declining to follow *Short v. Gaylord,* 462 So.2d 591.

3. Records (Key) 32

Press has right to have access to filed depositions in criminal case and to the trial plus pretrial and post-trial proceedings conducted by or before the judge.

4. Records (Key) 32

In absence of court order sealing the deposition, or some provision of law requiring the same to remain confidential, the press may not be excluded from reading, copying and reporting the contents of a deposition that has been filed with clerk of court. West's F.S.A. RCP Rule 1.400.

5. Records (Key) 32

Right of access of press to discovery depositions in criminal case does not accrue until there is a filing with clerk of court. West's F.S.A. RCP Rule 1.400.

6. Records (Key) 32

Nonfiled depositions in criminal case are not court records available to the press. West's F.S.A. R.Jud.Admin. Rule 2.075(a)(1).

7. Records (Key) 32

Test governing closure in criminal trials is not applicable to pretrial discovery proceedings such as discovery depositions.

8. Criminal Law (Key) 627.2

Discovery depositions are not subject to admission into evidence.

9. Criminal Law (Key) 627.2

Depositions taken to perpetuate testimony, which are different from discovery depositions, are admissible. West's F.S.A. RCrP Rule 3.190(j).

10. Criminal Law (Key) 635

Right of access for the press is no greater than that of the general public.

11. Criminal Law (Key) 635

Application of rule of civil procedure providing for protective order so that discovery may be conducted with no one present except persons designated by court [West's F.S.A. RCP Rule 1.280(c)(5)] is limited to instances where parties do not agree and there is controversy between them as to whom may be present.

12. Courts (Key) 97(1)

Federal and state rules of procedure were not so similar that federal decisions as to federal rules were necessarily binding on state courts as to whether the

press was entitled to access to pretrial discovery depositions in criminal case.

Talbot D'Alemberte and L. Martin Reeder, Jr., of Steel, Hector, Davis, Burns & Middleton, Palm Beach, for petitioner/Palm Beach Newspapers, Inc.

Richard J. Ovelmen, Miami, for petitioner/Miami Herald Pub. Co.

Jim Smith, Atty. Gen., Tallahassee, and Robert L. Bogen, Asst. Atty. Gen., West Palm Beach, for respondent/ Richard Bryan Burk.

Richard L. Jorandby, Public Defender, and Margaret Good, Asst. Public Defender, West Palm Beach, for respondent/Linda Aurilio.

UPON PETITION FOR REVIEW EN BANC

Palm Beach Newspapers, joined by other newspapers (all referred to as the Press), are here under the provisions of Florida Rule of Appellate Procedure 9.100.

There was pending an attempted murder case in West Palm Beach entitled *State of Florida v. Linda J. Aurilio,* Case No. 82-5858-CF-T. Being interested, the Press sought access, as hereinafter particularized, to pretrial discovery depositions in this criminal case. The effort was unsuccessful. The respondent trial judge basically ruled that such depositions are not judicial proceedings, and that such depositions are not court records until such time as they are transcribed and filed with the Clerk. The Press, being thereby disaccommodated, filed this proceeding.

[1-3] The questions to be resolved, as we understand them, are (1) Is the Press entitled to notice and an opportunity to attend pretrial discovery depositions in a

criminal case? and (2) Is the Press entitled to access to pretrial discovery depositions taken but not filed with the Clerk?[1]

Upon consideration of the excellent advice of counsel, we answer the questions in the negative. We approve and affirm the order under review.

To more exactly reflect the position and demands of the Press, we quote from the Press' Petition:

> Respondent's ruling that the petitioner may not attend depositions in this case should be reversed and the case should be remanded to determine whether closure of any particular deposition is appropriate under the three-part test of *Lewis*. The trial court must consider the facts which relate to a particular deposition before ordering that particular deposition closed.
>
> This Court also should direct the trial court to require the release or filing of any existing deposition transcripts and any deposition transcripts ordered in the future by the parties or the petitioner unless a motion to seal the transcripts is filed, and evidence produced at a hearing shows a compelling need to seal.
>
> Finally, the lower court should be directed to require the filing of all original notices of taking depositions in accordance with the rules of civil and criminal procedure. If a party believes that public or press access to any future depositions will infringe on the fair trial

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1. So that there may be no misunderstanding, we acknowledge the right of the Press to have access to the following:

A. Filed depositions because they then become part of the official court records. *Tallahassee Democrat, Inc. v. Willis*, 370 So.2d 867 (Fla. 1st DCA 1979)

B. The trial plus pretrial and posttrial proceedings conducted by or before the judge. *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979).

> rights of the accused or will unreasonably endanger the defendant or a witness or any other person, that party should file an appropriate motion seeking to restrict access and notice the media of the hearing thereon. At the hearing, the movant must be required to present evidence sufficient to overcome his burden of meeting each prong of the three-part test established in *Miami Herald v. Lewis* [426 So.2d 1 (Fla.1982)] and *Miami Herald v. State* [363 So.2d 603 (Fla.App.1978)].

The Press tells us that, "No Florida appellate court has addressed directly the issue here presented: whether depositions taken in the course of a criminal proceedings are pretrial judicial proceedings to which the right of access applies." We are then referred to a number of cases that, according to the Press, support their position by inference, deduction, or otherwise. Having reviewed such cases, we are not persuaded and see no gain to be accomplished by engaging in a disputation on a case by case basis. Perhaps the largest distinction to be found is that many of the cited cases deal with access to trial or proceedings actually conducted before the court (judge) in the courthouse while here the judge is not present at the taking of the depositions, which events may take place outside the courthouse. We found not a single case, statute or rule that we think precedentially commands the result contended for by the Press.[2] The survey, though educa-

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2. Following the preparation of this opinion, the case of *Short v. Gaylord,* 462 So.2d 591 (Fla. 2d DCA 1985) came to our attention. There, a trial court ruling which refused to exclude the press from attendance at pretrial discovery depositions in a criminal case was reviewed via certiorari proceedings. The Second District Court of Appeal held that such ruling was not a departure from the essential requirements of the law and it, therefore, denied certiorari. Accepting that the *Short* case and some of its pronouncements may conflict with our instant opinion, we do respectfully decline to accept or follow the precedent of the *Short* case.

tional, did indeed reveal the success of the press generally in gaining access to procedings theretofore thought private or subject to court discretion.

We support our decision that the Press has no constitutional right to access to pretrial depositions in a criminal case, as defined in the questions before us, by referring to the following cases:

GANNETT CO., INC. v. DePASQUALE

443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979)

While this case is not on point in that it deals primarily with press access to a pretrial hearing (before the judge in court) on a motion to suppress allegedly involuntary confessions and physical evidence in a criminal case, we think portion of the concurring opinion of Chief Justice Burger are illuminating:

> Even though the draftsmen of the Constitution could not anticipate the 20th-century pretrial proceedings to suppress evidence, pretrial proceedings were not wholly unknown in that day. Written interrogatories were used pretrial in 18th-century litigation, especially in admiralty cases. Thus, it is safe to assume that those lawyers who drafted the Sixth Amendment were not unaware that some testimony was likely to be recorded before trials took place. Yet, no one ever suggested that there was any "right" of the public to be present at such pretrial proceedings as were available in that time; until the trial it could not be known whether and to what extent the pretrial evidence would be offered or received.
>
> Similarly, during the last 40 years in which the pretrial processes have been enormously expanded, it

> has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial interrogatories were other than wholly private to the litigants. A pretrial deposition does not become part of a "trial" until and unless the contents of the deposition are offered in evidence. Pretrial depositions are not uncommon to take the testimony of a witness, either for the defense or for the prosecution. In the entire pretrial period, there is no certainty that a trial will take place. Something in the neighborhood of 85 percent of all criminal charges are resolved by guilty pleas, frequently after pretrial depositions have been taken or motions to suppress evidence have been ruled upon.
>
> For me, the essence of all of this is that by definition "pretrial proceedings" are exactly that.

Gannett, 443 U.S. at 396, 99 S.Ct. at 2914, 61 L.Ed.2d at 631.

TALLAHASSEE DEMOCRAT, INC. v. WILLIS

370 So.2d 867 (Fla. 1st DCA 1979)

[4-6] This case deals with Press access to written depositions filed with the Clerk. It held, among other things, "In sum, we conclude that the rules of procedure contemplate that upon filing, unless otherwise ordered by the court, a deposition becomes a part of the 'court file' (Rule 1.400, Florida Rule of Civil Procedure). According to this view, in the absence of a court order sealing the deposition, or some provision of law requiring the same to remain confidential, the Press may not be excluded from reading, copying and reporting the contents of a deposition." *Tallahassee,* 370 So.2d 870-871. We agree with this holding. *See also Ocala Star Banner Corp. v. Sturgis,* 388 So.2d 1367 (Fla. 5th DCA 1980). We note that the trigger device is the act of "filing." Thus, conversely, we

hold that no right of access accrues until there is a "filing." As all know, our rules of procedure do not blanket mandate the filing of depositions and other discovery documents. *See* Fla.R.Civ.P. 1.310(f) 3, 1.340, and 1.350. Moreover, Florida Rule of Judicial Administration 2.075(a)(1) defines court records as "the contents of the court file, depositions filed with the clerk. . . ." Thus, non-filed depositions are not court records available to the Press. Also, we know of no requirement for counsel to require transcription and to file a discovery deposition or statement when, for example, it was non-productive, hurtful to his cause, or where it will be of no use to him at trial.

Finally, we note with approval this statement and footnote because it partially capsulates a basis for our holding:

> Petitioners argue with great insistence the applicability of the notice and hearing procedures set forth in *State ex rel. Miami Herald Publishing Co. v. McIntosh* [340 So.2d 904 (Fla.1977)], *supra*. However, we perceive a distinction between press rights of access to court hearings or trials, and access to portions of the court file or records which may or may not be subject to public and press inspection, i.e., specifically, depositions.[4]

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4. We agree with respondent's observation (response by letter dated April 16, 1979) that depositions are "tools of discovery and preserving evidence", but we would add further qualifications and observations. A deposition does not become evidence in a case unless and until admitted by ruling of the court at a trial or hearing; that depositions very often contain matters that are not and can never be considered as evidence, since the scope of inquiry on depositions is not limited as in examination of a witness in a judicial proceeding; that persons not even parties to the case are often compelled under process of law to divulge information that is not intended for use as evidence, but merely to elicit or

> lead to information that might explain other evidence or become admissible as evidence; and the taking of a deposition itself can hardly be categorized as a "judicial proceeding" for the simple reason that there is no judge present and no rulings nor adjudications of any sort are made by any judicial authority. Further, in *criminal* cases, discovery depositions taken under Rule 3.220(d), Fla.R.Cr.P. may be used only "for the purpose of contradicting or impeaching testimony of the deponent as a witness"; and deposition testimony may be used as evidence at the trial only if taken to perpetuate testimony under Rule 3.190(j) requiring a court order, notice to defendant, and, if defendant is in custody, his presence at the deposition, and a showing that attendance of the witness cannot be procurred at the trial. *State v. Basiliere,* 353 So.2d 820 (Fla.1978).

Tallahassee, 370 So.2d at 871-72.

UNITED STATES v. GURNEY

558 F.2d 1202 (5th Cir.1977), rehearing denied 562 F.2d 1257 (5th Cir.1977), cert. denied, 435 U.S. 968, 98 S.Ct. 1606, 56 L.Ed.2d 59 (1978)

This was a criminal case, courthouse trial, which is a step closer than our case where the trial has yet to commence and where the proceedings were not conducted at the courthouse. In *Gurney,* the trial judge denied the Press access at trial to (1) the exhibits proffered but not yet admitted into evidence; (2) transcripts of bench conferences held in camera where exhibits and testimony were proffered; (3) written communication between the jury and judge; and (4) Gurney's grand jury testimony which had not been read to the jury. It also appears that the trial court failed to conduct a hearing on Press requests but merely entered oral orders denying access, which orders were subsequently confirmed in writing with reasons. These rulings and actions were affirmed by the United States Court of Appeals, Fifth Circuit, and certiorari was denied by the Supreme Court.

SEATTLE TIMES CO. v. RHINEHART

..... U.S. ....., 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984)

While this is a civil case which approved limitation upon use of pretrial discovery, we think some of its pronouncements are inferentially significant:

> As in all civil litigation, petitioners gained the information they wish to disseminate only by virtue of the trial court's discovery processes. As the rules authorizing discovery were adopted by the state legislature, the processes thereunder are a matter of legislative grace. A litigant has no First Amendment right of access to information made available only for purposes of trying his suit. *Zemel v. Rusk,* 381 U.S. 1, 16-17, 85 S.Ct. 1271, 1280-1281, 14 L.Ed.2d 179 (1965) ("The right to speak and publish does not carry with it the unrestrained right to gather information.") Thus, continued court control over, the discovered information does not raise the same spectre of government censorship that such control might suggest in other situations. See *In re Halkin,* 598 F.2d, at 206-207 (Wilkey, J. dissenting).
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> Moreover, pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, *Gannett Co. v. DePasquale,* 443 U.S. 368, 389, 99 S.Ct. 2898, 2910, 61 L.Ed.2d 608 (1979), and, in general, they are conducted in private as a matter of modern practice. See id., at 396, 99 S.Ct., at 2913-2914 (BURGER, C.J., concurring); Marcus, Myth and Reality in Protective Order Litigation, 69 Cornell L.Rev. 1 (1983). Much of the information that sur-

faces during pre-trial discovery may be unrelated or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.

Finally, it is significant to note that an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny. See *Gannett Co. v. DePasquale,* 443 U.S., at 399, 99 S.Ct., at 2915 (POWELL, J. concurring). As in this case, such a protective order prevents a party from disseminating only that information obtained through use of the discovery process. Thus, the party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's processes. In sum, judicial limitations on a party's ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in a different context.

Seattle Times Co., 104 S.Ct. at 2207-2208 (footnotes omitted).

* * *

. . . Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes. Because of the liberality of pretrial discovery permitted by Rule 26 (b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c). It is clear from experience that pretrial

discovery by depositions and interrogatories has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties. The Rules do not distinguish between public and private information. Nor do they apply only to parties to the litigation, as relevant information in the hands of third parties may be subject to discovery.

There is an opportunity, therefore, for litigants to obtain—incidentally or purposefully—information that not only is irrelevant but if publicly released could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes. Cf. *Herbert v. Lando,* 441 U.S. 153, 176-177, 99 S.Ct. 1635, 1648-1649, 60 L.Ed.2d 115 (1979); *Gumbel v. Pitkin,* 124 U.S. 131, 145-146, 8 S.Ct. 379, 384-385, 31 L.Ed. 374 (1888). As stated by Judge Friendly in *International Products Co. v. Koons,* 325 F.2d 403, 407-408 (CA2 1963), "[w]hether or not the Rule itself authorizes [a particular protective order] . . . we have no question as to the court's jurisdiction to do this under the inherent 'equitable powers of courts of law over their own process, to prevent abuses, oppression, and injustices.'" (citing *Gumbel v. Pitkin, supra*). The prevention of the abuse that can attend the coerced production of information under a state's discovery rule is sufficient justification for the authorization of protective orders.

Seattle Times Co., 104 S.Ct. at 2208-2209 (footnotes omitted).

FORT MYERS BROADCASTING COMPANY v. NELSON

460 So.2d 420 (Fla. 2d DCA 1984)

> We deny the petition for a writ of certiorari from the trial court's order closing to the public all discovery depositions in this libel lawsuit. See *Seattle Times Co. v. Rhinehart,* ..... U.S. ....., 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984); Fla.R.Civ.P. 1.280(c).

We shortly address the term, "pretrial discovery depositions." The word pretrial needs no elaboration. Discovery is partially defined in Black's Law Dictionary, Revised Fourth Edition, "In a general sense, the ascertainment of that which was previously unknown; the disclosure or coming to light of what was previously hidden." Discovery in criminal cases is provided in Florida Rule of Criminal Procedure 3.220 and discovery depositions are specifically provided in Florida Rule of Criminal Procedure 3.220(d) where it is said,

> At any time after the filing of the indictment or information the defendant may take the deposition upon oral examination of any person who may have information relevant to the offense charged. The deposition shall be taken in a building where the trial may be held, such other place agreed upon by the parties or where the trial court may designate by special or general order.

It is further provided, "Any deposition taken pursuant hereto may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness." Finally, the matter of notice and subpoenas is treated. Florida Rule of Criminal Procedure 3.220(a) discusses in detail the prosecutor's many obligations with reference to discovery. We think it is significant that

these important functions shall, according to Florida Rule of Criminal Procedure 3.220(a)(3), be performed in any manner mutually agreeable to the prosecutor and defense counsel or as ordered by the court. In other words, court supervision of the discovery process is not required so long as counsel can agree. Finally, the term "deposition" means the testimony of a witness given in advance of the trial upon oral examination or written questions where there is an opportunity for cross-examination. *See generally* 19 Fla.Jur.2d *Discovery and Depositions* § 59.

The Press urges that it should have access to pretrial discovery depositions as here contended unless someone moves for a protective order and successfully meets the three-pronged test promulgated in *Miami Herald Pub. Co. v. State,* 363 So.2d 603 (Fla. 4th DCA 1978) and adopted by the Florida Supreme Court in *Miami Herald Pub. Co. v. Lewis,* 426 So.2d 1 (Fla.1982). The test is that movants seeking closure or protection must establish:

1. Closure is necessary to prevent a serious and imminent threat to the administration of justice;

2. No alternatives are available other than a change of venue, which would protect a defendant's right to a fair trial; and

3. Closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.

In *Miami Herald Pub. Co. v. Lewis,* closure was sought as to a hearing on a motion to suppress the defendants' confessions in a homicide case. Different from the instant case, the suppression hearing was to be conducted before the judge in court. Moreover, different from the matter of pretrial discovery, the dimension of the problem in

Miami Herald Pub. Co. v. Lewis, was quite apparent. There had been extensive pretrial media coverage of the murder of a four-year-old child and the public, thanks to the media, was aware that the defendant had confessed. So the important but simple question there projected was: Should the media have the right to attend the suppression hearing and to publish its happenings and the content of the confession?

[7] We hold that the three-pronged test is not applicable to pretrial discovery proceedings such as discovery depositions because, among other things, the taking of such depositions is not a judicial proceeding since the judge is not in attendance and since the deposition cannot be received in evidence. More importantly, if such test were to be considered as applicable, it would be impossible to apply because of the inherent nature of such depositions. Counsel cannot know in advance what testimony will be adduced at discovery depositions.

Usually and for obvious reasons such discovery depositions are aimed at hostile witnesses, witnesses that refuse to communicate or give statements and witnesses that refuse to cooperate with counsel or his investigator seeking information. The reasons why counsel may seek to depose a witness in a criminal case defy being catalogued. Perhaps based on hunch or hearsay it is thought that the witness may have some knowledge of some kind about some facet of the alleged crime. The witness upon being deposed may reveal that he or she was an eye-witness or a participant or that the witness knows nothing. It may uncover incriminating or exculpatory information of large or small magnitude about all or some of the events. Again, the point is that counsel cannot know in advance, except by way of possible speculation and conjecture, what the witness knows and the scope of the testimony. Under

these circumstances counsel cannot apply in advance for protection and, if he did do so, he would have no way of satisfying the three-pronged test. Repetitively, how can he protect his client's right to a fair trial when he does not know if the witness's unrevealed and undiscovered testimony, if released to the media, would prejudice and place the defendant in jeopardy?

All who have taken discovery depositions know that it entails fishing on a dangerous and uncharted sea. However, they are very valuable tools and, in our opinion, a lawyer would be remiss in not making pretrial inquiry of witnesses where he has reason to think they may have knowledge of some kind concerning the alleged crime. If the witness incriminates the defendant when the indicated areas are plumbed, counsel will at least know what he may be faced with at trial and undertake to mount a defense. Counsel can undertake to elicit impeachment testimony and other matters that might impair the credibility of the witness. If the witness has friendly testimony then, of course, counsel will add the witness to his trial witness list.

[8, 9] Practical considerations militate against press access, although it is agreed that such considerations could not prevail if access was constitutionally mandated. As before mentioned, discovery depositions are not subject to admission into evidence. *Jackson v. State*, 453 So.2d 456 (Fla. 4th DCA 1984) *Terrell v. State*, 407 So.2d 1039 (Fla. 1st DCA 1981).[3] Moreover, as a general rule, there are many questions and answers that are proper as a matter of discovery which would not be allowable even if produced live at trial. Thus, if the Press is present at depo-

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3. Of course, depositions taken to perpetuate testimony, different from discovery depositions, would be admissible. *See* Fla.R.Crim.P. 3.190(j).

sition time it is fair to say that such presence would severely chill or inhibit the discovery process. The questioner is not likely to explore or pursue needed subjects and areas as he normally would if he learns that the answers may prejudice or damage his client or others if the answers are published before trial as indicative of the facts of the case.

[10] Such depositions are often arranged orally without formal notice for the convenience of counsel. Sometimes they are arranged on short notice and in such case it could be awkward to be required to give the Press reasonable notice. In addition, depositions are most often scheduled for a lawyer's or court reporter's office where space is limited. Without laboring it, most such places simply will not have sufficient accommodations to allow the presence of the media, especially in cases that the media would deem sensational or specially newsworthy. Moreover, it should be recognized that the right of access for the press is no greater than that of the general public. *Pell v. Procunier and Howchins v. KQED,* 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974). In other words, if the press can attend pretrial discovery depositions, so can the general public and this would only exacerbate the mentioned problem.

Finally, if media access should be required, it is reasonably predictable there will be collisions out of the presence of the court between counsel and the media as to access and the terms of it. These collisions will in many instances, we feel, require resolution by the court. This will require hearings, notice, counsel, orders, and the whole panoply. This will impose an additional work load on the judges and delay the prosecution.

We feel in sum that pretrial discovery depositions are but a part of pretrial preparation and as such are not a proper subject for press intrusion.

Finally, it seems to us that if those in higher authority believe in their wisdom that the Press should properly have the access for which they contend, we suggest that it should be accomplished by Supreme Court amendments to our rules of procedure, a matter within that court's purview and jurisdiction. *See* Art. V, § 2(a), Fla. Const. *See* dissent in *State ex rel. Gore Newspaper Co. v. Tyson,* 313 So.2d 777 at 790 (Fla. 4th DCA 1977), *overruled on other grounds, English v. McCrary,* 348 So.2d 293 (Fla.1977). We presume to say this based on our holding here to the effect that there is now no constitutional, procedural, or substantive mandate for such access.

[11, 12] We, on our own motion, hereby certify to the Supreme Court of the State of Florida, pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(v), that the following questions are of great public importance:

1. IS THE PRESS ENTITLED TO NOTICE AND THE OPPORTUNITY AND RIGHT TO ATTEND PRETRIAL DISCOVERY DEPOSITIONS IN A CRIMINAL CASE?

2. IS THE PRESS ENTITLED TO ACCESS TO PRETRIAL DISCOVERY DEPOSITIONS IN A CRIMINAL CASE WHICH MAY OR MAY NOT HAVE BEEN TRANSCRIBED BUT WHICH HAVE NOT BEEN FILED WITH THE CLERK OF COURT OR THE JUDGE?

AFFIRMED.[4]

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4. Having been afforded the privilege of reviewing the dissents filed by our colleagues prior to publication, we wish, not seeking the last word but in the interest of completeness, to offer a few additional comments so that the distinctions between our viewpoints may be finely drawn.

(Continued on following page)

DOWNEY, HERSEY, DELL and WALDEN, JJ., concur.

LETTS, J., concurs specially with opinion.

ANSTEAD, C.J., with whom HURLEY and BARKETT, JJ., join, dissents with opinion.

HURLEY, J., with whom GLICKSTEIN and BARKETT, JJ., join, dissents with opinion.

GLICKSTEIN, J., with whom HURLEY, J., joins, dissents with opinion.

Footnote continued—

American Telephone & Telegraph Co. v. Grady, 594 F.2d 594 (7th Cir.1978), *cert. denied*, 440 U.S. 971, 99 S.Ct. 1533, 59 L.Ed.2d 787 (1979) is cited for the proposition that pre-trial discovery depositions are open to the public. An examination of that case reveals that it does so state. However, we dare to question the worth of that precedent inasmuch as such statement is, in our opinion, a pure ipse dixit in that it cites no authority for such conclusion. It has been tracked and cited by several trial court federal cases which, likewise, cite no authority or compelling reason for the stance, being content to simply cite *American Telephone & Telegraph Co. v. Grady, supra.*

Indeed, not all federal cases support open depositions. *See Times News Ltd. v. McDonnell Douglas Corp.*, 387 F.Supp. 189 (1974), which held that depositions, as opposed to trials, are not open to public or press, and that neither the public or press has a right to be present.

The common thread which we divine from the dissenting opinions is that somehow the Florida Rules of Procedure as written command that public and press are entitled, as a matter of right to attend pretrial discovery depositions. It is here that we also part company.

Hoping not to be merely argumentative, we have searched the Rules and not found a mention of public and press or that they are entitled to notice and attendance at such depositions. We have dissected Florida Rule of Civil Procedure 1.280 and do not reach a conclusion that it serves that purpose. It is true that section (c) of that Rule provides for protective orders for many purposes, one of which is "(5) that discovery be conducted

(Continued on following page)

LETTS, Judge, concurring specially:

I agree with the majority. I am also of the opinion that this en banc offering, to say the least, is already overcrowded with individual expression. Nonetheless I cannot resist brief comment of my own.

First of all, our Florida Supreme Court, rightly or wrongly, has flatly stated that the Press does not enjoy a constitutional right to attend pre-trial hearings. *Miami Herald Publishing Co. v. Lewis*, 426 So.2d 1, 6 (Fla.1982). If it has no present constitutional right to attend pre-trial HEARINGS then, a fortiorari, it has no present constitutional right to attend pre-trial DEPOSITIONS. This current Supreme Court holding, which we must follow, and which in its turn followed *Gannett Co., Inc. v. DePasquale, supra*, is one of the reasons why the majority

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Footnote continued—

with no one present except persons designated by the court." We construe its application to be limited to instances where the parties do not agree and there is controversy between them as to who may be present. For example, this might be applicable where trade secrets or sensitive matters will be pursued or where one of the parties or his or her friends insist on being present and are disruptive. We do not read it that everybody, public and press, are entitled ipso facto to attend unless the court orders otherwise. To repeat, if the Rules are to be the avenue so opening up depositions, then the Rules in our opinion must be amended to specifically so state.

Finally, and hoping not to unduly labor the matter, we reject the suggestion that in this area the federal and Florida rules of procedure are so similar that the federal decisions as to federal rules necessarily bind Florida courts. Without comparing them rule by rule, we believe that there are significant differences. For instance, Rule 30(f)(1) of the Federal Rules pertains to the court reporter. It requires, with reference to depositions, that he or she shall certify it, securely seal it, and promptly file it with the court. Differently, our Florida Rule 1.310(f) does not require that a deposition be filed or even transcribed. *See Tavoulareas v. Washington Post Co.*, 737 F.2d 1170 (D.C.Cir.1984) (en banc), and particularly footnotes 12 and 14.

has affirmed and then sought to lay all doubt to rest by certifying the question.

As to the several dissenting views that the Press has a right to attend criminal depositions under Florida Rule of Civil Procedure 1.280(c)(5), I cannot accept them though the Federal cases cited are not inapt. To my way of thinking, the draftsmen of the Florida provisions concerning discovery, never in their wildest dreams contemplated that the protective order subsection would be so interpreted and certainly it does not expressly permit such a construction. Indeed, if I am wrong, then it must follow that the Press has the right to be present at all *civil* depositions in lawyers' offices. Even the Press does not advance such an argument in this appeal and I hope our Supreme Court will not countenance it.

Finally, the main dissent's admission that where depositions are involved, "the showing need not be of the same magnitude required to close a *court* hearing" means little to me unless I am told what lesser showing *will* be required. It is suggested that the right to actual presence might be substituted instead for a right to transcription if the Press pays for it. To me this is a distinction without much of a difference, except for dollars and cents.[5]

ANSTEAD, Chief Judge, with whom HURLEY and BARKETT, Judges, join, dissenting:

I cannot agree with the majority's blanket denial of public access to pretrial criminal depositions. Respectfully, I believe the majority has placed the presumption, indeed

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5. It perhaps could be argued that lack of actual presence might lessen the chilling effect referred to in the majority opinion. However, this argument is not advanced by the particular dissent.

a conclusive presumption, on the wrong side.[6] While I believe that the showing required to justify the closure of a deposition should be much less than that required to justify the closure of a court hearing or a trial, I nevertheless believe that there should be a presumption of public access to depositions taken after a public criminal prosecution is initiated and that the party seeking to exclude the public must convince the court that "closure is essential to preserve higher values and [that the terms of closure are] narrowly tailored to serve that interest." *Press-Enterprise Co. v. Superior Court of California,* 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984).

Without even considering the federal constitutional interests involved, it is clear that Florida has long recognized that "the people have a right to know what occurs in the courts." *Miami Herald Publishing Co. v. Lewis,* 426 So.2d 1 (Fla.1982). This right of access has been recognized not only in the case of trials and pretrial hearings, but also in the case of criminal depositions and even un-

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6. The ruling of the majority, in my view, conflicts with the very U.S. Supreme Court holding cited in support of the ruling. In *Seattle Times Co. v. Rhinehart,* ..... U.S. ....., 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), the Supreme Court implicitly recognized that the burden was on a party seeking to prevent public disclosure to secure a protective order:

> We therefore hold that where, as in this case, a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.

104 S.Ct. 2199 at 2209-10. While upholding the protective order entered the Court nevertheless put the shoe on the right foot. Other federal courts have explicitly held that civil discovery depositions are open to the public absent a protective order to the contrary. *AT & T v. Grady,* 594 F.2d 594 (7th Cir.1978). If this is true in civil cases it must surely also apply to criminal cases where the public is in a very real sense a party to the proceedings and certainly has a greater interest in access to the proceedings.

transcribed tape recordings furnished as discovery by the state to the defendant in a criminal prosecution. *Tallahassee Democrat, Inc. v. Willis,* 370 So.2d 867 (Fla. 1st DCA 1979) and *Satz v. Blankenship,* 407 So.2d 396 (Fla. 4th DCA 1981), *pet. for rev. denied,* 413 So.2d 877 (Fla. 1982).

In *Satz,* this court construed the provisions of the Public Record Act, section 119.01, Florida Statutes (1979) to mandate public access to *any* discovery information possessed by the state once that information is disclosed to a criminal defendant:

> [O]nce the tape recordings were given to [the defendant] the information no longer carried with it the legitimacy of law enforcement secrecy. At the point of disclosure, the information became public in a sense as public information, it lost its efficacy in deterring criminal activity. Accordingly, the trial court acted properly in releasing the tapes to appellee.

Id. at 398. For the life of me I do not see how we can mandate public access to an untranscribed tape recording and yet deny access to an untranscribed deposition. It is the public's right of access to the *information* that is crucial, not the particular form or container in which that information may be found.

Similarly, I cannot accept the totally technical and semantical distinction made by the majority between the right of access to a deposition transcribed and filed, a decision presumably made solely at the discretion of the lawyers involved, and a deposition taken but not transcribed. Again, it is the public's right to access to the *information disclosed* at the deposition that should be determinative. That determination should not be left to the unbridled discretion of the lawyers, either of whom

presumably could order transcription without the permission of the other or court order. Hence, poof!, "secret" information is transformed into "public" information.

The same observations may be made of the contentions that depositions are not "judicial proceedings."[7] Tell that to someone being tried for perjury or to someone seeking a qualified or absolute privilege in a defamation action. Depositions are taken by the invocation of all the same judicial authority that is called to bear when a witness is subpoenaed to testify in any official court proceeding. The public prosecution of a criminal defendant is a judicial proceeding and the compelled testimony of a witness taken prior to trial is an integral part of that judicial proceeding. The witness is compelled to attend by the service of a subpoena issued under the authority of the court. The

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7. Fla.R.Crim.P. 3.220(d) provides:

Discovery Depositions. At any time after the filing of the indictment or information the defendant may take the deposition upon oral examination of any person who may have information relevant to the offense charged. The deposition shall be taken in a building where the trial may be held, such other place agreed upon by the parties or where the trial court may designate by special or general order. The party taking the deposition shall give written notice to each other party. The notice shall state the time and place the deposition is to be taken and the name of each person to be examined. After notice to the parties the court may, for good cause shown, extend or shorten the time and may change the place of taking. Except as provided herein, the procedure for taking such deposition, including the scope of the examination, shall be the same as that provided in the Florida Rules of Civil Procedure. Any deposition taken pursuant hereto may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. The trial court or its clerk shall, upon application, issue subpoenas for the persons whose depositions are to be taken. A resident of the State may be required to attend an examination only in the county wherein he resides, or is employed, or regularly transacts his business in person. A person who refuses to obey a subpoena served upon him may be adjudged in contempt of the court from which the subpoena issued.

witness is sworn to testify truthfully in that judicial proceeding and is subject to sanctions by the court for failure to appear, failure to testify, or failure to testify truthfully. That deposition is then subject to use for a multitude of purposes, including plea bargaining, use at pretrial hearings, and use at trial. Indeed, Florida, like virtually every other jurisdiction, has in essence a pretrial criminal justice system in which the overwhelming majority of cases are concluded without a trial. In most instances, then, the information disclosed through discovery will be the only information the public has about the facts of the case.[8] We must also keep in mind that there is nothing to prevent a defendant from taking a private statement from a witness out of the public's presence. It is only when the formal authority of the court is invoked by the use of a deposition that the invocation of the presumption of public access is necessary.

In my view, once the public's prosecutor elects to initiate a public prosecution, there should be a presumption

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8. As Justice Stevens noted in concurrence in *Press-Enterprise*,

> [T]he distinction between trials and other official proceedings is not necessarily dispositive, or even important, in evaluating the First Amendment issues. . . .
>
> The focus commanded by the First Amendment makes it appropriate to emphasize the fact that the underpinning of our holding today is not simply the interest in effective judicial administration; the First Amendment's concerns are much broader. The "common core purpose of assuring freedom of communication on matters relating to the functioning of government," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 [100 S.Ct. 2814, 65 L.Ed.2d 973] (1980) (plurality opinion), that underlies the decision of cases of this kind provides protection to all members of the public "from abridgment of their rights of access to information about the operation of their government, including the Judicial Branch." *Id.*, at 584, 100 S.Ct. at 2831 (Stevens, J., concurring).

of openness to all events that take place, including the taking of depositions.[9] The burden should be on the one seeking to exclude the public's eye to establish an overriding interest in the maintenance of secrecy of the particular proceeding. As noted earlier, such a showing need not be of the same magnitude required to close a *court* hearing. The right and the value to access to those proceedings is markedly higher, arguably, than to access to depositions. Nevertheless, some showing should be made if the issue arises. Perhaps, in some instances, as in the case of the tape recording in *Satz*, the right of access will be limited to the right to have the deposition transcribed, at the expense of the public member seeking access. Indeed, since the public has no right to participate in the deposition, the right to transcription may be an attractive alternative to live attendance in many cases. This would also solve the litany of practical problems discussed in the majority opinion. Again, it is recognition of the right of public access to the information that should be the focus of concern.

As to the need for revision of our rules to accommodate access, the rules are already in place. The criminal rules as to depositions either closely parallel or incorporate by reference the rules of civil procedure pertaining to discovery. Both sets of rules require a party to secure a protective order if the discovery is to be conducted outside the public eye. The federal courts have explicitly interpreted similar federal rules to mandate public access absent a protective order:

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9. Some proceedings are closed by statute. For example see Florida Statutes, Section 905.24 (grand jury proceedings); Section 934.08 (information gained through wiretaps); Section 934.091 (names of subjects of wiretaps). Also see *Satz* case cited in body of opinion for secrecy of police investigatory files.

> As a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings.

AT & T v. Grady, 594 F.2d 594 (7th Cir. 1978). Florida Rule of Civil Procedure 1.280(c)(5) specifically provides that upon motion and for good cause shown a party may secure a protective order limiting those persons who may be present when a deposition is taken. This provision would certainly apply as well to criminal depositions where the rule expressly provides that the procedure for taking criminal depositions will be the same as in civil cases except as is expressly provided otherwise. Fla.R.Crim.P. 3.220(d). In short, we need not worry about devising new rules and procedure since it appears that the drafters of the rules contemplated that there might be times when the parties wanted to exclude others from a deposition and they had a good reason for doing so. I would do no more than mandate compliance with these rules, keeping in mind the public policy of this state in favor of disclosure. At the same time, however, I would do no less.

HURLEY, Judge, with whom GLICKSTEIN and BARKETT, Judges, join, dissenting.

The trial court predicated its order excluding the press from pretrial discovery depositions on the rationale that depositions are not judicial proceedings and, therefore, "there is no right to access by the public personally or the media to attend the taking of discovery depositions." By taking this blanket position, the court abrogated its responsibility under Rule 1.280(c)(5), Fla.R.Civ.P., to restrict attendance at discovery depositions only for good cause. The trial court's formulation relieves it of any necessity to exercise its discretion on a case-by-case basis. This, in my view, constitutes a departure from the essential requirements of law.

Discovery depositions in criminal cases are governed by Rule 3.220(d), Fla.R.Crim.P., which states that "[e]xcept as provided herein, the procedure for taking such deposition . . . shall be the same as that provided in the Florida Rules of Civil Procedure." Rule 1.280(c)(5), Fla.R.Civ.P., in turn, authorizes a trial court, "*for good cause shown,*" to order "that discovery be conducted with no one present except persons designated by the court. . . ." (Emphasis supplied.) Thus, the rules of court—not the common law nor the constitution—give rise to a presumption of openness for pretrial discovery. "As a general proposition, pretrial discovey must take place in the public unless compelling reasons exist for denying the public access to the proceedings.' *American Telephone & Telegraph Co. v. Grady*, 594 F.2d 594, 596 (7th Cir.1978), *cert. denied*, 440 U.S. 971, 99 S.Ct. 1533, 59 L.Ed.2d 787 (1979); *see also Tavoulareas v. Washington Post Co.*, 737 F.2d 1170 (D.C. Cir.1984) (*en banc*); *Broan Manufacturing Co. v. Westinghouse Electric Corp.*, 101 F.R.D. 773 (E.D. Wis.1984).[10]

It is significant that the parties in this case attempted to establish good cause to exclude the press, but failed.[11]

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10. Federal case law is persuasive in this area because the Florida Rules of Civil Procedure are patterned after the federal rules. *See In re Estate of Zimbrick*, 453 So.2d 1155 (Fla. 4th DCA 1984) (*en banc*); *Tallahassee Democrat, Inc. v. Willis*, 370 So.2d 867 (Fla. 1st DCA 1979). The majority notes that Florida does not have any appellate decisions directly on point. *Ante*, at 573. There are, however, several reported trial court decisions which uphold the right of the press to attend pretrial discovery depositions. *See Cazarez v. Church of Scientology*, 6 Med.L.Rptr. 2109 (Fla. 6th Cir.Ct.1980); *State v. Diggs*, 5 Med. L.Rptr. 2596 (Fla. 11th Cir.Ct.1980); *State v. Alford*, 5 Med.L. Rpt. 2054 (Fla. 15th Cir.Ct.1979); *State v. Bundy*, 4 Med.L.Rptr. 2629 (Fla. 2d Cir.Ct.1979).

11. The state filed a motion for a protective order pursuant to Rule 1.280(c)(5), Fla.R.Civ.P. Although the defense decided not to join in the motion, counsel indicated that he did not oppose it. Moreover, his remarks indicate that he favored the motion.

The trial court (a predecessor to the trial judge who entered the order on appeal) denied the state's motion without prejudice. Rather than reapply, the state entered into an agreement with the defense to take depositions of witnesses at various times and places unknown to the press. Indeed, the trial court expressly found that "the defendant and the State admit that it is their intent to avoid taking depositions with the News Media present." Only when the press realized that it had won a hollow victory, did it petition for the right to attend pretrial discovery depositions.

In my view, the parties should not be permitted to achieve through collusion what they could not obtain by court order. Litigation is not the parties' private preserve; it is conducted in a public forum subject to rules which embody public policy choices.[12] In the case at bar, first the parties and then the court chose to disregard the rule's presumption of openness. This constitutes a sufficiently serious error to justify issuing the writ and quashing the order. The trial court should be instructed to safeguard the openness of pretrial discovery unless and until good cause is established to justify a limitation. "Good cause," of course, is a flexible standard which can be adapted to meet the exigencies of individual cases. Inasmuch as attendance at pretrial discovery proceedings does not rest on the constitutional right of access, I too agree that good cause may be measured by a lesser standard than that required for closure of trial proceedings.

GLICKSTEIN, Judge, with whom HURLEY, Judge, joins, dissenting:

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12. "These policies relate to the public's right to monitor the functioning of our courts, thereby insuring quality, honesty, and respect for our legal system." *In re Continental Illinois Securities Litigation*, 732 F.2d 1302, 1308 (7th Cir. 1984).

My learned colleagues who find no constitutional right of press access to pretrial discovery deposition proceedings are not in error. *See, e.g., Tavoulareas v. Washington Post Co.*, 724 F.2d 1010, 1017 (D.C. Cir.), vacated on other grounds, 737 F.2d 1170 (1984) (en banc); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 608-10, 98 S.Ct. 1306, 1317-18, 55 L.Ed.2d 570 (1978); *Zenith Radio Corp. v. Matushita Electric Industrial Co.*, 529 F.Supp. 866, 913-14 (E.D.Pa.1981). It is likewise clear that at common law deposition documents were accessible to the public only after they were filed with the court. But, as both Judge Anstead and Judge Hurley point out, a presumption of openness of discovery proceedings apparently derives from our rules of procedure.

I decline to concur with Judge Anstead's opinion only because some of his discussion may be susceptible to the deduction some more fundamental basis for openness of pretrial discovery proceedings exists than our rules of procedure. I concur with Judge Hurley's opinion because it finds the presumption of openness only by virtue of those rules.

It has been frequently stated that where a provision of Florida rules of procedure is substantially identical with a federal rule, we should use federal court decisions to illuminate our rule. *E.g. Shooster v. Gelfand,* 439 So.2d 1000, 1001 (Fla. 4th DCA 1983); *Carson v. City of Fort Lauderdale,* 173 So.2d 743, 744 (Fla. 2d DCA 1965). Here, Florida Rule of Criminal Procedure 3.220(d) adopts, for taking depositions, the procedure which is provided in our civil procedure rules, with exceptions not pertinent here. Rule 1.280(c), Florida Rules of Civil Procedure, which concerns protective orders pertaining to discovery, including depositions, is substantially identical with Federal Rule of Civil Procedure 26(c). Judge Hurley cites cases from

two United States Circuit Courts of Appeal that clearly state the presumption implied in the latter rule, that discovery proceedings are open unless a protective order for good cause has been obtained. *Times Newspapers Limited* conflicts, but it is older and the product of a trial court. In the circumstances I think we must recognize that the prevailing federal courts' construction of the federal rule is applicable as well to ours, since we do not know that in adopting the federal rule language our Supreme Court intended a different construction.

I agree that the questions of great public importance, as stated in the opinion for the court, should be certified to the Florida Supreme Court. They can tell us for certain what they intended when they adopted rule 1.280(c).

IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA
CRIMINAL DIVISION

CASE NO. 82-5858 CF

STATE OF FLORIDA,

vs.

LINDA AURILIO,
Defendant.

ORDER

(February 28, 1983)

This cause came on to be heard on Palm Beach Newspapers, Inc. Motion to Reconsider this Court's oral ruling of February 10, 1983, and written order of February 11, 1983, that depositions are not judicial proceedings. The Court granted the Motion to Reconsider, considered the memoranda submitted February 24, 1983, by counsel for Palm Beach Newspapers and the defendant, and at a hearing on February 25, 1983, considered arguments by counsel for Palm Beach Newspapers, the state and the defendant. Counsel for the News and Sun Sentinel Co. also appeared and adopted the arguments of Palm Beach Newspaper. The Court now determines that its initial decision that depositions are not judicial proceedings is proper. *Tallahassee Democrat, Inc. v. Willis,* 370 So.2d 867 (Fla. 1st DCA 1979), *Ocala Star Banner v. Sturgis,* 388 So.2d 1367 (Fla. 5th DCA 1980). Therefor, there is no right of access by the public personally or the media to attend the taking of discovery depositions.

Upon reconsideration, this Court finds that it over-extended itself in the February 11 order by requiring the defendant to submit her depositions to the Court for an in camera inspection. Depositions are not "court records" until filed with the clerk. Fla. R. Jud. Admin. 2.075 (a)(1). The present rule, Fla. R. Civ. Pro. 1.310(f)(3) precludes the filing of depositions except upon court order when they are necessary for the determination of a pending matter. Chief Judge Lewis Kapner of the Fifteenth Judicial Circuit has directed the Clerk of the Circuit Court not to accept for filing any depositions, interrogatories or documents in response to requests for production except by court order. (Memo of February 3, 1982, from Chief Judge Lewis Kapner to John Dunkle, Clerk of Court.) The Court therefore recedes from that portion of the order requiring the defendant and the State to designate which portions of defendant's depositions they wish the Court to review so they could be made available to the media through arrangements with the court reporter. Copies of the depositions tendered to the Court will be returned to the defendant and the State.

In regard to the depositions already taken, if the parties agree to do so they may be filed and the parties may request a hearing in camera. If any depositions are filed in this cause after a court order, they will obviously be available to the media and the public. If depositions are required to be filed and the parties seek protection from publication, the Court will look to the state and the defendant to file a motion for closure.

For the benefit of the media so they may take an appeal, the Court realizes this is a matter of great public concern which the appellate court should specifically address.

DONE AND ORDERED IN CHAMBERS AT WEST PALM BEACH, PALM BEACH COUNTY, FLORIDA, ON THIS 28th DAY OF February, 1983.

/s/ Richard B. Burk
Circuit Judge

copies furnished:

Assistant State Attorney Carl Weinberg
Assistant Public Defender Andrew Klyman
Wilton L. Strickland, Esq.
L. Martin Reeder, Jr., Esq.

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA CRIMINAL DIVISION T (BURK)

CASE NO. 82-5858 CF

STATE OF FLORIDA,

vs.

LINDA J. AURILIO,
Defendant.

ORDER
(February 11, 1983)

THIS CAUSE came on to be heard on the Defendant AURILIO's Motion to Dismiss directed to Press Intervenor's Motion for Limited Intervention to Oppose Closure and To Obtain Access to Public Records, and Motion to Open Access to Pre-Trial Depositions and to Order Production of Public Records. Upon argument of counsel for the Defendant AURILIO, the State of Florida, and the Press Intervenor, and the Court being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED:

1. Defendant AURILIO's Motion to Dismiss directed to the two Motions filed in this cause by the Press Intervenor be and the same is hereby denied.

2. It is this Court's determination and ruling that the taking of a deposition is not a judicial proceeding for purposes of allowing access to the taking of that deposi-

tion to the public or to media representatives. Press Intervenor's reporters shall not be permitted to attend the actual taking of those depositions that remain to be taken in this cause unless otherwise agreed to by the parties (RBB).

3. As to those depositions that have been previously taken in this cause, the State of Florida and the Defendant AURILIO shall have until Thursday, February 17, 1983, 5:00 P.M. to provide a list of all of the depositions heretofore taken in this cause to counsel for the Press Intervenor and a copy for the Court file (RBB). Defense Counsel and/or the State shall, at that time, designate which depositions they wish the Court to review in camera and give the reason(s) for such requests. The State and/or Defense Counsel shall provide the Court with the page numbers of the designated depositions with copies of the depositions for the Court to review. Those depositions where no such motion or request is made by the State or Defense Counsel shall be made immediately available by the Court Reporter to the media (RBB) for their review and copying as may be arranged with the Court Reporter (RBB). The State and Defense Counsel shall advise the Court Reporter as to those depositions there is no problem with so that they can be made immediately available to the media (RBB).

4. As to the disposition of future depositions in this cause, the State and the Defense Counsel shall file notices of taking said depositions with the Clerk of the Court for filing in the Court file. As to future depositions, either the State or Defense Counsel shall have 48 hours from receipt of the transcribed deposition to make a determination as to whether or not they wish to petition the Court for said deposition or portions thereof to be sealed

and not released to media representatives. If no objection or motion for in camera review is filed within the 48 hours by either the State or the Defense Counsel, it shall be deemed that there is no objectionable material in said deposition and the Court Reporter shall release the deposition to the media representatives for their review and copying.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, on this 11th day of February, 1983.

/s/ Richard B. Burk
Circuit Judge

SEAL

Copies Furnished:

Assistant State Attorney Carl Weinberg
Assistant Public Defendant Andrew Klyman
Wilton L. Strickland, Esquire

IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA.

CASE # 82-5858-CF AO2

STATE OF FLORIDA,

vs.

LINDA AURILIO,
Defendant.

ORDER

(January 18, 1983)

This matter came before the Court on the Defendant, Linda Aurilio's Motion to Determine her Sixth Amendment (6th) rights under the United States Constitution. The Defendant through her attorney seeks to depose certain witnesses who have knowledge relative to this case. At a prior hearing in the Palm Beach County Court House, the defendant sought to exclude the press from a scheduled deposition. This matter was appealed by the Media to this Court and this Court by order dated, December 8. 1982, DENIED the Motion to Exclude the Press.

Since that time, the Defendant and the State have made mutual private agreements to take the depositions of witnesses at various times and places unknown to the News Media. The defendant and the State admit that it is their intent to avoid taking the depositions with the News Media present. The Media through its reporters have telephoned the defendant and the State and de-

manded copies of the depositions. The Media takes the position that the transcript of depositions are public material and should be provided to them. The Media also contends that the State and Defendant have conspired to evade the Court's Order prohibiting them from excluding the Media.

Fla. Rules of Criminal Procedure 3.220 (d) required that the Procedure for taking depositions shall be the same as that provided in the Fla., Rules of Civil Procedure. The Rules of Civil Procedure 1.30 allow for depositions to be taken without leave of the Court. While attendance of witnesses may be compeled by subpoena, it is not necessarily a Judicial Proceedings. The depositions taken by the Plaintiff and Defendant in a civil case and the State and the Defendant in an criminal case are primarily investigatory tools, and are not subject to the same public scrutiny as are Judicial Proceedings. In the instant case, if the State and the Defendant agree to talk to a witness who volunteers to meet with them, it would seem to be extremely burdensome upon them to have to notify the Media of what, when and where, these conversations are to take place. Once these conversations are reduced to writing and filed with the Clerk's Office, of course, they become a matter of Public record.

The Sixth Amendment (6th) to the United State Constitution requires, that,

> "In all Criminal Prosecutions, the accused shall enjoyed the right to a speedy and public trial---."

Obviously, the plain intent of the Constitutional Amendment is to give the accused a right, should he so desire, to a public trial. It seems that if he understands that he has the right and wishes to waive it, he ought to

have the right to do so, as was stated in the case of GANNETT CO. V. DePASQUALE, 443 U.S. 368 (1979)

The Court held:

"that the Sixth Amendment's guarantee to the accused of a public trial gave neither the public nor the press an enforceable right of access to pre-trial Suppression hearing."

The Court finds that the defendant in this case has a right to waive her Sixth Amendment rights under the U.S. Constitution, as they relate to Non-Judicial depositions. Of course, the Media must be allowed to attend, the Court Ordered depositions, or depositions held in the public facilities of the Palm Beach County Courthouse. In order to further protect the record however, the Court is going to prohibit the destruction or editing of any depositions taken, without order of the Court. IT IS THEREUPON ORDERED:

1. The defendant and the State Attorney's Office will not be required to notify the News Media of its intent to take statements, either under oath or not under oath, where Judicial process is not involved, other than issuing a subpoena.

2. IT IS FURTHER ORDER: that the State and Defense is prohibited from destroying depositions taken and typed up in this case without further order of this Court.

3. IT IS FURTHER ORDERED: that where notice of depositions are required to be filed and are filed, they must be taken in a place which will admit access to the public and the press.

DONE AND ORDERED IN CHAMBERS this 18th day of January, 1983, at West Palm Beach County, Florida.

/s/ Edward Rodgers
Edward Rodgers, Circuit Judge

Copies Furnished:

State Attorney
Clerk's Office, Criminal Division
Ferrero, Middlebrooks, & Strickland, P.A.
P.O. Box 14604
707 S.E. Third Avenue
Ft. Lauderdale, Florida

(SEAL)

LEWIS KAPNER
Chief Judge

Fifteenth Judicial Circuit of Florida
County Court House
West Palm Beach, Florida 33401
305/437-8581

MEMO

TO: JOHN DUNKLE CLERK OF COURT

FROM: CHIEF JUDGE LEWIS KAPNER

DATE: FEBRUARY 3, 1982

RE: RULE 1.310(f)(3)(A) FILING OF DEPOSITIONS

Rules 1.310(f)(3)(A); 1.340 and 1.350, effective January 1, 1982, provide that copies of depositions, completed interrogatories and documents in response to requests for production are to be filed only when they should be considered by the court. This determination should be decided by the judge hearing the case. Accordingly, please do not accept any such papers for filing except by court order. If an attorney wishes to file a deposition, interrogatory, or other such document, please suggest that the attorney bring the document to the hearing or trial so that the judge can determine whether it should be filed.

LK:mcb

xc: All Judges
Robert Horey
Helen Perry
Ted Deckert
Catherine Royce*

* Please publish in the next issue of the Bar Bulletin.

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. 82-5858 CF
Judge Edward Rodgers

STATE OF FLORIDA,
Plaintiff,
vs.
LINDA AURILIO,
Defendant.

ORDER
(December 8, 1982)

THIS CAUSE having come on to be heard on STATE OF FLORIDA's Motion for Protective Order to limit persons to be present at discovery depositions, and to exclude others, including the media and the public in general, from access to pre-trial depositions taken and/or to be taken in the above captioned action, and the Court having heard argument of counsel, and being otherwise fully advised in the premises, it is thereupon

ORDERED and ADJUDGED that the STATE OF FLORIDA's Motion for Protective Order to exclude the media from access to pre-trial depositions taken and/or to be taken in the above captioned action be and the same is hereby denied without prejudice.

DONE and ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida on this 8th day of December, 1982.

/s/ Edward Rodgers
Circuit Judge

Copies Furnished:

CARL D. WEINBERG, ESQUIRE
ANDREW M. KLYMAN, ESQUIRE
WILTON L. STRICKLAND, ESQUIRE

MIAMI HERALD PUBLISHING CO. v. HAGLER

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Miami Herald Publishing Company v. Hagler, 471 So.2d 1344 (Fla. 4th DCA 1985)

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MIAMI HERALD PUBLISHING COMPANY, et al.,
Petitioners,

v.

John W. HAGLER, et al., Respondents.

No. 67479.

Supreme Court of Florida.

May 7, 1987.

Application for Review of the Decision of the District Court of Appeal—Direct Conflict of Decisions, Fourth District—Case No. 83-2062.

Richard J. Ovelmen, Gen. Counsel, The Miami Herald Pub. Co., Miami, Parker D. Thomson, Sanford L. Bohrer and Jerold I. Budney of Thomson, Zeder, Bohrer, Werth, Adorno & Razook, Miami, and Laura Besvinick of Greer, Homer, Cope & Bonner, Miami, for Miami Herald Pub. Co.

Donald M. Middlebrooks, L. Martin Reeder, Jr. and Thomas R. Julin of Steel, Hector & Davis, Miami, for Palm Beach Newspapers, Inc.

Nelson E. Bailey, West Palm Beach, for John W. Hagler.

Robert A. Butterworth, Atty. Gen., and Louis F. Hubener, Asst. Atty. Gen., Tallahassee, for the State.

Dan Paul and Franklin G. Burt of Paul and Burt, Miami, and George H. Freeman, Legal Dept., New York Times, New York City, for amici curiae, Gainesville Sun

Pub. Co., Lake City Reporter, Inc., Lakeland Ledger Pub. Corp., Leesburg Daily Commercial, Inc., Ocala Star-Banner Corp., The Palatka Daily News, Inc., The New York Times Co., Fernandina Beach News-Leader, Inc., and Sebring News-Sun, Inc.

PER CURIAM.

This case, *Miami Herald Publishing Co. v. Hagler,* 471 So.2d 1344 (Fla. 4th DCA 1985), is one of a series of cases presenting issues which were certified as questions of great public importance by *Palm Beach Newspapers, Inc. v. Burk,* 471 So.2d 571 (Fla. 4th DCA 1985). We tentatively accepted jurisdiction to ensure consistency of decisions. Our decision in *Palm Beach Newspapers, Inc. v. Burk,* 504 So.2d 378 (Fla.1987), answering the certified questions and affirming the court below obviates jurisdiction. We deny the petition for review.

It is so ordered.

McDONALD, C.J., and OVERTON, EHRLICH, SHAW, GRIMES and KOGAN, JJ., concur.

The MIAMI HERALD PUBLISHING COMPANY and Palm Beach Newspapers, Inc., Petitioners,

v.

John W. HAGLER and the State of Florida, Respondents.

No. 83-2062.

District Court of Appeal of Florida, Fourth District.

June 26, 1985.
Rehearing Denied July 24, 1985.

On petition for writ of certiorari to the Circuit Court for Palm Beach County; Carl H. Harper, Judge.

L. Martin Reeder, Talbot D'Alemberte, and Thomas R. Julin of Steel, Hector & Davis; and Richard J. Ovelmen, General Counsel, The Miami Herald Publishing Company, Miami, for petitioners.

Nelson E. Bailey, West Palm Beach, for respondent Hagler.

Jim Smith, Atty. Gen., Tallahassee, and Max Rudmann, Asst. Atty. Gen., West Palm Beach, for respondent State of Florida.

PER CURIAM.

The order of September 12, 1983, is affirmed on the authority of *Palm Beach Newspapers, Inc. v. Burk*, 471 So.2d 571 (Fla. 4th DCA 1985).

DELL and WALDEN, JJ., concur.

BARKETT, J., concurs specially with opinion.

BARKETT, Judge, concurring specially.

I concur because of the binding precedent of *Palm Beach Newspapers v. Burk*, 471 So.2d 571 (Fla. 4th DCA 1985), although I think the correct view in this case is expressed by the dissents in *Burk*. The unique facts of this case underscore the reasoning in those dissents. Here, the State Attorney of the Fifteenth Judicial Circuit of Florida, David Bludworth, was deposed pursuant to Rule 3.220(d), Florida Rules of Criminal Procedure, in a pending criminal case at the request of the criminal defendant, John Hagler. Bludworth became a witness in the case as a result of the defendant's allegations that the defendant was entrapped into selling cocaine when he offered to sell allegedly compromising photographs of the State Attorney. No written notice of the deposition was filed because the State and the defense lawyer had agreed to take the deposition "in secret" and not to order or file the transcript. Among other claims, the defendant's attorney had suggested the State Attorney had a conflict of interest while continuing to prosecute the case.

As is noted in Judge Hurley's dissent in *Burk*, a major policy reason for open proceedings in the courts is "the public's right to monitor the functioning of our courts, thereby ensuring quality, honesty, and respect for our legal system." *In the Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302, 1308 (7th Cir.1984). Agreements to bypass the rules, and to take secret depositions of the State Attorney in a pending criminal case prosecuted by the same State Attorney's office, are much more prone to ensure speculation and distrust rather than to ensure confidence in our legal system.

IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA
- CRIMINAL DIVISION

CASE NO. 82-3750 CF A 02 U

STATE OF FLORIDA

vs.

JOHN WILLIAM HAGLER,
Defendant

ORDER DENYING MOVANTS' MOTIONS
(September 12, 1983)

The "Motion to Release Transcript of Secret Deposition to the Press and Public and to Require Future Depositions to be Open Unless Ordered Closed by the Court" was filed on September 2, 1983 on behalf of Mike Boehm, reporter for the *Miami Herald,* the Miami Herald Publishing Company and Palm Beach Newspapers, Inc. (hereinafter referred to as the movants). Courtesy copies thereof, including the legal authories relied upon, had been furnished to the court on September 1, 1983. In opposition thereto, on September 6, 1983, a "Motion to Dismiss or Strike Pleading and Memorandum of Law" was filed on behalf of the defendant herein, John William Hagler, and a Motion to Strike Pleadings was filed on behalf of the State of Florida. The matter came on for hearing on the 8:45 A.M. calendar as set by the movants and was duly reported. Inasmuch as the essential facts are not in dispute and the issues involve only questions of law, no testimony or other evidence was presented or required. The court heard the arguments of respective counsel and

had already reviewed the authorities relied upon by the movants. The court denied the motion filed by the movants pending entry of this written order. Thereafter, on September 8, 1983 the movants filed a "Motion for Reconsideration" and a separate "Motion for Order to Require Court Reporter to Type and File Deposition Transcript", noticing the latter motion for hearing on the 8:45 A.M. calendar scheduled for September 13, 1983 without leave of court. It is also noted that all but the latter motion are incorrectly styled "Civil Division" by the movants' counsel.

As noted above, the essential facts are not in dispute. On August 29, 1983, David H. Bludworth, State Attorney of the Fifteenth Judicial Circuit of Florida, personally appeared before Michael Greenhill, Court Reporter, and gave his discovery deposition pursuant to Rule 3.220(d) at the behest of the defendant, John William Hagler. No written notice of the taking of the deposition had been filed as contemplated by Rule 3.220(d) inasmuch as the State and the defense had mutually scheduled the deposition without compliance with the written notice requirement. Neither the State nor the defense have requested the court reporter to type the deposition transcript. Both the State and the defense announced at the hearing that they did not intend to do so because Mr. Bludworth is not listed as a potential witness and will not be called to testify in the defendant's criminal trial scheduled before this court, and therefore the so-called "secret" deposition would not be needed or used by either party. Upon learning of the taking of the Bludworth deposition, the movants requested the court reporter to type the transcript at their cost, but the request was denied. The State and the defense have refused to authorize the court reporter to do so as well. Consequently, the Bludworth deposition has not been filed in the court file.

The movants contend that the procedure surrounding the taking of Mr. Bludworth's deposition violates the Florida Rules of Criminal Procedure and Administrative Order No. 1.010 dated February 15, 1980; and further violates their "First Amendment and Florida Common Law rights to attend judicial proceedings".

Based on a review of the pleadings referred to hereinabove, the authorities relied upon by the parties herein in support of and in opposition to the relief sought, and upon due consideration of the arguments of respective counsel, it is:

ORDERED AND ADJUDGED as follows:

1. The movants do not have standing to complain as to the alleged violation of Rule 3.220(d) relating to discovery depositions. The Rule expressly provides, among other things,

> ". . . The *party taking the deposition shall give written notice to each other party.* The notice shall state the time and place the deposition is to be taken and the name of each person to be examined. . . *Any deposition taken pursuant hereto may be used by any party* for the purpose of contradicting or impeaching the testimony of the deponent as a witnes. The trial court or its clerk shall, *upon application,* issue subpoenas for the persons whose depositions are to be taken. . ." (emphasis mine)

Clearly the movants are not *parties* to the criminal case pending between the State of Florida and the defendant, John William Hagler. Rule 3.220(d) confers certain rights and duties upon the *parties* of a criminal case in order to accommodate an orderly preparation for trial. Of course, the lawyers in a criminal case have the right

and are encouraged to waive the notice requirements of the Rule. See for example the Code of Professional Responsibility, Canon 7, EC 7-38 which reads in part:

> "*A lawyer* should be courteous to opposing counsel and *should accede to reasonable requests regarding* court proceedings, setting, continuances, *waiver of procedural formalities,* and similar matters which do not prejudice the rights of his client." (emphasis mine)

The Rule does not confer rights upon the general public or its alter-ego, the press. To give the notice requirements of Rule 3.220(d) the broad construction desired by the movants would literally make the press an indispensable party in every stage of a criminal case and would run counter to Rule 3.020 which states:

> "These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure and fairness in administration."

The notice requirements of Rule 3.220(d) are not intended to assist the press in a witch hunt or to satisfy press curiosity. Lawyers must remain free to investigate and prepare their client's case without unnecessary, unreasonable intrusion and interference by the public and press.

The movants' reliance on Rule 1.080(d) as it relates to the filing of papers with the court is misplaced and misses the target. That Rule requires that "all original papers shall be filed with the court either before service or immediately thereafter". It does not require that a subpoena must be issued to a witness who agrees to voluntarily appear for deposition without a subpoena. It

merely requires that *if* a subpoena is served on a witness, the original subpoena must be filed.

2. The reliance of the movants on Administrative Order No. 1.010 is likewise misplaced. The administrative order provides:

> "A motion to limit or prohibit public access to Court proceedings and a notice of hearing concerning the motion shall be served upon all parties and upon all media organizations that have filed a completed 'Request for Notification' with the Clerk's office. . ."

By its clear meaning, the order governs motions to prohibit public access to court proceedings, i.e. closure. Neither the State nor the defendant herein filed a motion to prohibit access to taking of the deposition and no court order of closure was ever entered. Therefore, there has been no restraint of the movants' First Amendment rights. Furthermore, as will be noted hereinafter, the mere taking of a discovery deposition pursuant to Rule 3.220(d) is not a "court proceeding" or judicial proceeding to which the public and/or the press has an unqualified right to attend.

3. The contention of the movants that the taking of a discovery deposition in a criminal case pursuant to Rule 3.220(d) is a "judicial proceeding" to which the public and/or the press has an unqualified right to attend is erroneous as this court opined in footnote 1 of an order entered in Pulitzer v. Pulitzer more than a year ago (August 24, 1982), a copy of which has been provided to all counsel herein. This court is still of the firm opinion that the taking of discovery depositions (in criminal or civil cases) is not a "judicial proceeding" to which the public and/or press is entitled to prior notice and to

attend as a matter of absolute right. This court's opinion is supported by the dicta in *Tallahassee Democrat, Inc. v. Willis,* 370 So.2d 867 (1979), where it was stated in footnote 4 at page 872:

> ". . . the taking of a deposition itself can hardly be categorized as a judicial proceeding for the simple reason that there is no judge present, and no rulings nor adjudications of any sort are made by any judicial authority. . ."

That appellate court held that discovery depositions once filed in the court file become a public record of a court, accessible to the public, absent a proper court order on a case by case basis sealing the deposition. See also *Ocala Star Banner Corp. v. Sturgis,* 388 So.2d 1367 (5 DCA 1980), wherein that appellate court directly concluded on page 1371:

> "We therefore conclude that the press does not have the absolute right to attend the taking of a deposition, that its presence may be regulated by the court under Rule 1.280(c), but that once the deposition is taken, transcribed and filed in the court file, there is a right of access to it unless a protective order is entered by the court under the said rule",

certifying the issue to the Florida Supreme Court. Unfortunately, the Supreme Court has not ruled thereon. For analogous authority see also *State v. Dolen,* 390 So.2d 407 (5 DCA 1980), wherein that appellate court held that even the accused defendant in a criminal case does not have an absolute right to attend the taking of a discovery deposition in his own case taken pursuant to Rule 3.220(d) stating at page 409:

> "The scope of the 'trial' has not been extended to discovery depositions as they are not true judicial proceedings",

citing *Tallahassee Democrat, Inc. v. Willis,* supra. If the taking of a discovery deposition is not a "judicial proceeding" to which an accused defendant has an absolute right to attend, does counsel for the movants seriously contend that the press enjoys such an absolute right? The movants do not enjoy a right of access superior to that of the public merely because the movants claim to be "the watch dog and ultimate guarantor of the fairness and accountability of our judicial system" as stated in their Motion for Reconsideration. See *Garrett v. Estelle,* 558 F.2d 1274 (5th Cir. 1977), and *United States v. Gurney,* 558 F.2d 1202 (5th Cir. 1977). Freedom of the press is not and has never been a private property right granted to those who own the media. *State ex rel. Miami Herald Publishing Co. v. McIntosh,* 340 So.2d 904, 910 (Fla. 1977).

None of the appellate court decisions cited by the movants' counsel have held that the taking of discovery depositions is a judicial proceeding to which the public and/or the press has an absolute right to attend. On the contrary, those cases deal with closure of trials or with prior restraints on what can be published by the press, and are therefore readily distinguishable. As to the circuit court opinions cited by movants' counsel in support of the motion, this court must respectfully disagree insofar as they ruled that the mere taking of depositions is a judicial proceeding to which the public and press has a right to attend. This court is of a different legal opinion, and more importantly this court is bound by the appellate decisions in *Tallahassee Democrat, Inc.*

v. Willis; Ocala Star Banner Corp. v. Sturgis; and *State v. Dolen,* supra as required by *State v. Hayes,* 333 So.2d 51 (4 DCA 1976), since there is no contrary holding by the Fourth District Court of Appeal or Supreme Court of Florida.

Rule 2.070(j), Florida Rules of Judicial Administration, states as follows:

> "Transcripts of all judicial proceedings, including depositions, shall be uniform in and for all courts throughout the state."

That Rule does not define "judicial proceedings" to include depositions, but merely requires that all transcripts thereof shall be uniform. *Black's Law Dictionary,* Fourth Edition, defines "judicial proceeding" as:

> "Any proceeding wherein judicial action is invoked and taken; any proceeding to obtain such remedy as the law allows; any step taken in a court of justice in the prosecution or defense of an action."

Judge Learned Hand, in *Doe v. Rosenberry,* 255 F.2d 118 (2nd Cir. 1958) stated that:

> "'Judicial proceeding' includes any proceeding determinable by a court, having for its object the compliance of any person, subject to judicial control, with standards imposed upon his conduct in the public interest, even though such compliance is enforced without the procedure applicable to the punishment of crime." *Id.* at page 120.

Accordingly, the Motion to Release Transcript of the Bludworth deposition is denied.

4. To the extent that the movants seek to require "that all future depositions to be open unless ordered

closed by the court", the motion is likewise denied for the reasons stated above.

5. The Motion for Reconsideration filed on behalf of the movants is summarily denied. The numerous statistical reports and news articles attached thereto have no legal relevance or probative value as to whether the taking of discovery depositions is a judicial proceeding to which the movants had a right to attend. This court has spent many hours considering the issues raised herein and on similar issues raised in prior cases, and in preparation of this written order. No useful purpose would be served at a rehearing even though the issue is raised with recurring frequency in high profile cases. Instead, this court would encourage the movants to pursue the issue where it counts, namely appellate review in the Fourth District Court of Appeal in an effort to resolve the time-consuming question with binding, controlling case law, settling the troublesome issue once and for all. There should be uniformity among the trial court judges. Speaking for myself, I welcome some guidance from the Fourth District Court of Appeal since I seem to be in the minority among my colleagues on the subject.

6. The movants' "Motion for Order to Require Court Reporter to Type and File Deposition Transcript" is likewise denied summarily. Rule 1.310(f)(2), Florida Rules of Civil Procedure, expressly provides:

> "Upon payment of reasonable charges therefor the officer shall furnish a copy of the deposition *to any party or to the deponent*",

and that Rule is applicable in criminal cases as well by virtue of Rule 3.220(d). Since the movants are not parties or deponents in this criminal case, they have no standing to require the court reporter to type and file the Bludworth

transcript. Nevertheless, in an effort to preserve the status quo pending an appellate resolution of the issues herein, if any, this court hereby orders the court reporter, Michael Greenhill, to safely preserve his original notes of the Bludworth deposition until further order of this court or of the Fourth District Court of Appeal.

In closing, this Order should not be construed as any restraint upon the movants to pursue their First Amendment freedoms through the use of their broad investigative powers and resources, but without the benefit of the Bludworth deposition. If and when that deposition is used in a court hearing or trial, or is filed with the Clerk of this court, it will then become a public record of this court, readily accessible to the public, unless sealed by an appropriate court order after full compliance with Administrative Order 1.010 and a showing of "good cause" as required by *State v. Newman*, 405 So.2d 971 (Fla. 1981) and meeting the three prong test of *Palm Beach Newspapers, Inc. v. Nourse*, 413 So.2d 467 (4 DCA 1982).

DONE AND ORDERED this 12th day of September, 1983 at West Palm Beach, Palm Beach County, Florida.

/s/ Carl H. Harper
Carl H. Harper, Circuit Judge

Copy to:

State Attorney
Nelson Bailey, Esq.
L. Martin Reeder, Esq.

PALM BEACH NEWSPAPERS, INC. v. STATE

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et al., Petitioners.

v.

STATE of FLORIDA, Respondent.

No. 67482.

Supreme Court of Florida.

May 7, 1987.

Application for Review of the Decision of the District Court of Appeal—Direct Conflict of Decisions, Fourth District—Case No. 85-687.

Donald M. Middlebrooks, L. Martin Reeder, Jr., Thomas R. Julin and Joan H. Lowenstein of Steel, Hector and Davis, Miami, for Palm Beach Newspapers, Inc. and Scripps-Howard Broadcasting Co.

Ray Ferrero, Jr., Wilton L. Middlebrooks and Ricki Tannen of Ferrero, Middlebrooks, Strickland & Fischer, P.A., Fort Lauderdale, for News and Sun-Sentinel Co.

Richard J. Ovelmen, Gen. Counsel, The Miami Herald Pub.Co., Miami, Bruce W. Greer, Gerald B. Cope, Jr. and Laura Besvinick of Greer, Homer, Cope & Bonner, P.A., Miami, and Sanford Bohrer and Jerold I. Budney of Thomson, Zeder, Bohrer, Werth, Adorno & Razook, Miami, for the Miami Herald Pub. Co.

Pablo Perhacs, Asst. State Atty., Fifteenth Judicial Circuit, West Palm Beach, for respondent.

PER CURIAM.

This case, *State v. Freund*, 473 So.2d 274 (Fla. 4th DCA 1985), is one of a series of cases presenting issues which were certified as questions of great public importance by *Palm Beach Newspapers, Inc. v. Burk*, 471 So.2d 571 (Fla. 4th DCA 1985). We tentatively accepted jurisdiction to ensure consistency of decisions. Our decision in *Palm Beach Newspapers, Inc. v. Burk*, 504 So.2d 378 (Fla.1987), answering the certified questions and affirming the court below obviates jurisdiction. We deny the petition for review.

It is so ordered.

McDONALD, C.J., and OVERTON, EHRLICH, SHAW, GRIMES and KOGAN, JJ., concur.

STATE of Florida, Petitioner,

v.

John S. FREUND, John Trent, Palm Beach Newspapers, Inc., Scripps-Howard Broadcasting Company, Miami Herald Publishing Company, and the Fort Lauderdale News and Sun Sentinel, Respondents.

No. 85-687.

District Court of Appeal of Florida,
Fourth District.

July 31, 1985.

On petition for writ of certiorari from the Circuit Court, Palm Beach County, Marvin Mounts, Jr., J., the District Court of Appeal held that trial court erred in permitting media attendance at pretrial depositions in a criminal proceeding.

Writ issued.

Letts, J., concurred specially with opinion.

Criminal Law (Key) 635

Trial court erred in permitting media attendance at pretrial depositions in criminal proceeding.

Pablo Perhacs. Asst. State Atty., West Palm Beach, for petitioner.

L. Martin Reeder, Jr., D. Culver Smith, III, and Thomas R. Julin of Steel Hector Davis Burns & Middleton, Palm Beach, for respondents—Palm Beach Newspapers and Scripps-Howard Broadcasting.

Janice Burton Sharpstein and Laura Besvinick of Sharpstein & Sharpstein, P.A., Coconut Grove, and Richard J. Ovelmen, Gen. Counsel, Miami for respondent—Miami Herald.

Ray Ferrero, Jr. of Ferrero, Middlebrooks & Strickland, Fort Lauderdale, for respondents—Fort Lauderdale News and Sun Sentinel.

PER CURIAM.

The trial court permitted media attendance at pretrial depositions in a criminal proceeding pursuant to our sister court's holding in *Short v. Gaylord Broadcasting Co.*, 462 So.2d 591 (Fla. 2d DCA 1981). Since then this court announced its *en banc* decision in *Palm Beach Newspapers, Inc. v. Burk,* 471 So.2d 571 (Fla. 4th DCA 1985), which takes the opposite view from *Short* and which must govern the case at bar. Accordingly, we grant the writ and quash the trial court's order on the authority of our *en banc* decision in *Burk.*

WRIT ISSUED.

HERSEY, C.J., and HURLEY, J., concur.

LETTS, J., concurs specially with opinion.

LETTS, Judge, specially concurring.

I agree that *Burk, supra,* governs this case. However, while considering the particular matter now before us, I realize that the statement by the Florida Supreme Court in *Miami Herald Publishing Co. v. Lewis,* 426 So.2d

1 (Fla.1982), that "[t]here is no first amendment protection of the press' rights to attend pretrial hearings" is suspect, if it relies, as it appears to, on *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979). If the Florida court continues to be of the same mind when it addresses the issue of pretrial depositions, it should not, as I did in *Burk* when I quoted *Lewis*, rely on *Gannett*. The *Gannett* decision, while admittedly equivocal, is clarified in a later United States Supreme Court case where it is confirmed that the media has in fact a "qualified" first amendment right to attend pretrial suppression hearings. *Waller v. Georgia*, ... U.S. ....., 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

I would also certify this particular case. True, to do so should be an unnecessary exercise because of *Jollie v. State*, 405 So.2d 418 (Fla.1981). However, the issue is certainly of great public importance, the certification has been requested, and it makes it that much easier for the litigants if we do so.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR PALM BEACH COUNTY, FLORIDA
CRIMINAL DIVISION

CASE NO. 84-4974 CF A and B 02

STATE OF FLORIDA

vs.

JOHN S. FREUND and
JOHN TRENT,
Defendants.

ORDER

(February 22, 1985)

This matter is before the Court on the State's Response to Oral Motion of Defense to Compel Deposition Testimony; State's Motion for Protective Order and State's Motion to Require News Media Representatives to Demonstrate the Existence of a Right for Them and the Public to be Present During a Discovery Deposition.

The State is represented by Assistant State Attorney Pablo Perhacs; the news media intervenors are represented by Attorney Martin Reeder, Jr. Also participating at various times have been Assistant State Attorney Jorge Labarga, the prosecutor in the case and Attorneys Douglas Duncan for defendant Freund and David Roth for defendant Trent.

— RULING —

The State's Motions are denied.

— DISCUSSION —

Neither defendant objects to the media being present although defendant Freund indicated a desire to reserve his right to petition for a change of venue.

It is interesting to observe that the role positions are switched in this particular legal issue because ordinarily it is the defense who is concerned about keeping the alleged facts of the case out of the media so that prospective jurors will not be tainted with preconceived notions about the state of the case.

The State represented that they desired a precise ruling as to whether or not a deposition is a judicial proceeding. That ruling is unnecessary in light of *Short v. Gaylord Broadcasting Co.*, 2nd DCA Case Number 84-2576, 10 FLW 257 (Feb. 1, 1985). I note parenthetically, however, that I recede from my decision in an earlier case that a deposition is a judicial proceeding.

At the initial emergency hearing in this matter, It was represented by the State that the media should be excluded because of the great havoc and emotional strain that their presence would work upon the several witnesses, one of whom was a police officer. The State has withdrawn this assertion.

As I indicated gratuitously in both hearings, I would think that the State ordinarily would want to take advantage of such an opportunity if only for the purpose of familiarizing its witnesses with the atmosphere of the courtroom; a dress rehearsal so to speak, to prepare them for the eventual trial.

In any event, it seems clear to me that I am bound by the *Gaylord* decision. As that decision points out,

the situation occurring here is governed by Florida Rule of Civil Procedure 1.280(c) which provides for protective orders. As the Court indicates at page 258: "This rule gives the trial court control over who may or may not attend depositions; the court's discretion is limited only by the standard 'for good cause shown'. The Rule places the burden of obtaining a protective order on the person or party seeking to limit attendance at a deposition."

It is represented to the Court that when these depositions were scheduled, the attorneys and witnesses were greeted by a television camera erected at close proximity to the witness chair and several reporters for other media interests. The place of the deposition had been transferred from the small and typical deposition room into the larger area of a courtroom.

Lawyers and judges are deeply concerned about the access of the public and the media to depositions, in my opinion. As pointed out by the State in its brief, (citing footnote number 4 from *Tallahassee Democrat v. Willis*, 370 So.2d 867, 870 (1st DCA 1979)), depositions very often contain matters that are not and can never be considered as evidence, since the scope of inquiry on depositions is not limited as in examination of a witness in a judicial proceeding. Persons not even parties to the case are often compelled under process of law to divulge information that is not intended for use as evidence, but merely to elicit or lead to information that might explain other evidence or become admissible as evidence.

Indeed, the whole corpus of the law of evidence governing trials is directed to one goal: reliability and trustworthiness. We lawyers and judges know that even under the protection of these copious rules of evidence, reliability and trustworthiness are elusive qualities in

the best of trials. The rules encouraging reliability do not apply at depositions even though the witness is under oath.

The press already has the right to quote from depositions with complete immunity from lawsuit unless the plaintiff can establish actual malice. To quote a hearsay rumor in copy that describes it as a judicial proceeding under oath is an opportunity to do grave damage to the reputations of individuals. I think it unlikely that we can expect the media to quote from a deposition and then qualify it by explaining that depositions contain some inadmissible and unreliable matters. For that is tantamount to saying what we just printed may be untrue or unprovable.

Moving on to the last matter of concern, it is directed that the attorneys arrange for access of the media to these depositions in the same fashion as is provided in an actual judicial proceeding.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida, in chambers this 22nd day of February, 1985.

/s/ Marvin Mounts, Jr.
Marvin Mounts, Jr., Circuit Judge

copies furnished counsel

CONSTITUTIONAL PROVISIONS AND RULES

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UNITED STATES CONSTITUTION, AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION 1

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RULE 3.220, FLORIDA RULES OF CRIMINAL PROCEDURE

VI. DISCOVERY

Rule 3.220. Discovery

(a) Prosecutor's Obligation.

(1) After the filing of the indictment or information, within fifteen days after written demand by the defendant, the prosecutor shall disclose to defense counsel and permit him to inspect, copy, test

and photograph, the following information and material within the State's possession or control:

(i) The names and addresses of all persons known to the prosecutor to have information which may be relevant to the offense charged, and to any defense with respect thereto.

(ii) The statement of any person whose name is furnished in compliance with the preceding paragraph. The term "statement" as used herein means a written statement made by said person and signed or otherwise adopted or approved by him, or a stenographic, mechanical, electrical, or other recording, or a transcript thereof, or which is a substantially verbatim recital of an oral statement made by said person to an officer or agent of the State and recorded contemporaneously with the making of such oral statement, provided, however, if the court determines *in camera* proceedings as provided in subsection (i) hereof that any police report contains irrelevant, sensitive information or information interrelated with other crimes or criminal activities and the disclosure of the contents of such police report may seriously impair law enforcement or jeopardize the investigation of such other crimes or activities, the court may prohibit or partially restrict such disclosure. The court shall prohibit the State from introducing in evidence the material not disclosed, so as to secure and maintain fairness in the just determination of the cause.

(iii) Any written or recorded statements and the substance of any oral statements made

by the accused, including a copy of any statements contained in police reports or report summaries, together with the name and address of each witness to the statements.

(iv) Any written or recorded statements and the substance of any oral statements made by a co-defendant if the trial is to be a joint one.

(v) Those portions of recorded grand jury minutes that contain testimony of the accused.

(vi) Any tangible papers or objects which were obtained from or belonged to the accused.

(vii) Whether the State has any material or information which has been provided by a confidential informant.

(viii) Whether there has been any electronic surveillance, including wiretapping, of the premises of the accused, or of conversations to which the accused was a party; and, any documents relating thereto.

(ix) Whether there has been any search or seizure and any documents relating thereto.

(x) Reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons.

(xi) Any tangible papers or objects which the prosecuting attorney intends to use in the hearing or trial and which were not obtained from or belonged to the accused.

(2) As soon as practicable after the filing of the indictment or information the prosecutor shall

disclose to the defense counsel any material information within the State's possession or control which tends to negate the guilt of the accused as to the offense charged.

(3) The prosecutor shall perform the foregoing obligations in any manner mutually agreeable to him and defense counsel or as ordered by the court.

(4) The court may deny or partially restrict disclosures authorized by this Rule if it finds there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from such disclosure, which outweighs any usefulness of the disclosure to defense counsel.

(5) Upon a showing of materiality to the preparation of the defense, the court may require such other discovery to defense counsel as justice may require.

(b) Disclosure to Prosecution.

(1) After the filing of the indictment or information and subject to constitutional limitations, a judicial officer may require the accused to:

(i) Appear in a line-up;

(ii) Speak for identification by witnesses to an offense;

(iii) Be fingerprinted;

(iv) Pose for photographs not involving reenactment of a scene;

(v) Try on articles of clothing;

(vi) Permit the taking of specimens of material under his fingernails;

(vii) Permit the taking of samples of his blood, hair and other materials of his body which involves no unreasonable intrusion thereof;

(viii) Provide specimens of his handwriting; and

(ix) Submit to a reasonable physical or medical inspection of his body.

(2) Whenever the personal appearance of the accused is required for the foregoing purposes, reasonable notice of the time and place of such appearance shall be given by the prosecuting attorney to the accused and his counsel. Provisions may be made for appearances for such purposes in an order admitting the accused to bail or providing for his pretrial release.

(3) Within seven days after receipt by defense counsel of the list of names and addresses furnished by the prosecutor pursuant to Section (a)(1)(i) of this Rule the defense counsel shall furnish to the prosecutor a written list of all witnesses whom the defense counsel expects to call as witnesses at the trial or hearing. When the prosecutor subpoenas a witness whose name has been furnished by defense counsel, except for trial subpoenas, reasonable notice shall be given to defense counsel as to the time and place of examination pursuant to the subpoena. At such examination, defense counsel shall have the right to be present and to examine the witness.

(4) If the defendant demands discovery under Section (a)(1)(ii), (x), (xi) of this Rule, the defen-

dant shall disclose to the prosecutor and permit him to inspect, copy, test and photograph, the following information and material which corresponds to that which the defendant sought and which is in the defendant's possession or control:

(i) The statement of any person whom the defendant expects to call as a trial witness other than that of the defendant.

(ii) Reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons.

(iii) Any tangible papers or objects which the defense counsel intends to use in the hearing or trial.

Defense counsel shall make the foregoing disclosures within fifteen days after receipt by him of the corresponding disclosure from the prospector. Defense counsel shall perform the foregoing obligations in any manner mutually agreeable to him and the prosecutor; or as ordered by the court.

The filing of a motion for protective order by the prosecutor will automatically stay the times provided for in this section. If a protective order is granted, the defendant may, within two days thereafter, or at any time before the prosecutor furnishes the information or material which is the subject of the motion for protective order, withdraw his demand and not be required to furnish reciprocal discovery.

(c) Matters Not Subject to Disclosure.

(1) *Work Product.* Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda, to the extent that they contain the opinions, theories, or conclusions of the prosecuting or defense attorney, or members of his legal staff.

(2) *Informants.* Disclosure of a confidential informant shall not be required unless the confidential informant is to be produced at a hearing or trial, or a failure to disclose his identity will infringe the constitutional rights of the accused.

(d) Discovery Depositions.

(1) At any time after the filing of the indictment or informatoin the defendant may take the deposition upon oral examination of any person who may have information relevant to the offense charged. The deposition shall be taken in a building where the trial may be held, such other place agreed upon by the parties or where the trial court may designate by special or general order. The party taking the deposition shall give reasonable written notice to each other party. The notice shall state the time and place the deposition is to be taken and the name of each person to be examined. After notice to the parties the court may, for good cause shown, extend or shorten the time and may change the place of taking. Except as provided herein, the procedure for taking such deposition, including the scope of the examination, shall be the same as that provided in the Florida Rules of Civil Procedure. Any deposition taken pursuant hereto may be used by any party for the purpose of

contradicting or impeaching the testimony of the deponent as a witness. The trial court or its clerk shall, upon application, issue subpoenas for the persons whose depositions are to be taken. In any case, including multiple defendant or consolidated cases, no person shall be deposed more than once except by consent of the parties, or by order of the court issued upon good cause shown. A resident of the State may be required to attend an examination only in the county wherein he resides, or is employed, or regularly transacts his business in person. A person who refuses to obey a subpoena served upon him may be adjudged in contempt of the court from which the subpoena issued.

(2) No transcript of a deposition for which a county may be obligated to expend funds shall be ordered by a party unless it is: (a) agreed between the State and any defendant that the deposition should be transcribed and a written agreement certifying that the deposed witness is material or specifying other good cause is filed with the court, or (b) ordered by the court upon a showing that the deposed witness is material or upon showing of good cause. This rule shall not apply to applications for reimbursement of costs pursuant to Florida Statute 939.06 and Article I Section 9 of the Florida Constitution.

(e) Investigations Not to Be Impeded. Except as is otherwise provided as to matters not subject to disclosure or restricted by protective orders, neither the counsel for the parties nor other prosecution or defense personnel shall advise persons having relevant material or information (except the accused) to refrain from discussing the case with opposing counsel, or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel's investigation of the case.

(f) Continuing Duty to Disclose. If, subsequent to compliance with the rules, a party discovers additional witnesses or material which he would have been under a duty to disclose or produce at the time of such previous compliance, he shall promptly disclose or produce such witnesses or material in the same manner as required under these rules for initial discovery.

(g) Court May Alter Times. The court may alter the times for compliance with any discovery under these rules upon good cause shown.

(h) Protective Orders. Upon a showing of cause, the court may at any time order that specified disclosures be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit such party to make beneficial use thereof.

(i) In Camera Proceedings. Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or any portion of such showing to be made *in camera*. A record shall be made of such proceedings. If the court enters an order granting the relief following a showing *in camera*, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(j) Sanctions.

(1) If, at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or with an order issued pursuant to an applicable discovery rule, the court may order such party to comply with the discovery or inspection of materials not previously disclosed or produced, grant

a continuance, grant a mistrial, prohibit the party from calling a witness not disclosed or introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances.

(2) Willful violation by counsel of an applicable discovery rule, or an order issued pursuant thereto, may subject counsel to appropriate sanctions by the court.

(k) Costs of Indigents. After a defendant is adjudged insolvent, the reasonable costs incurred in the operation of these rules shall be taxed as costs against the county.

(l) Pre-trial Conference. The trial court may hold one or more pre-trial conferences, with trial counsel present, to consider such matters as will promote a fair and expeditious trial. The accused shall be present unless he waives this in writing. Amended Feb. 10, 1977, effective July 1, 1977 (343 So.2d 1247); July 18, 1980, effective Jan. 1, 1981 (389 So.2d 610); Nov. 26, 1986 (498 So.2d 875).

RULE 1.280(c), FLORIDA RULES OF CIVIL PROCEDURE

Rule 1.280. General Provisions Governing Discovery

* * *

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires, including one

or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 1.380(a)(4) apply to the award of expenses incurred in relation to the motion.

RULE 1.310(f) AND (g), FLORIDA RULES OF CIVIL PROCEDURE

Rule 1.310. Depositions Upon Oral Examination

* * *

(f) Filing; Exhibits.

(1) If transcribed, the officer shall certify on each copy of the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. Doc-

uments and things produced for inspection during the examination of the witness shall be marked for identification and annexed to and returned with the deposition upon the request of a party, and may be inspected and copied by any party, except that the person producing the materials may substitute copies to be marked for identification if he affords to all parties fair opportunity to verify the copies by comparison with the originals. If the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them and the materials may then be used in the same manner as if annexed to and returned with the deposition.

(2) Upon payment of reasonable charges therefor the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) A copy of a deposition may be filed only:

(A) By a party or the witness when the contents of the deposition must be considered by the court on any matter pending before the court. Prompt notice of the filing of the deposition shall be given to all parties unless notice is waived. A party filing the deposition shall furnish a copy of the deposition or the part being filed to other parties unless the party already has a copy.

(B) If the court determines that a deposition previously taken is necessary for the decision of a matter pending before the court, the court may order that a copy be filed by any party at the initial cost of the party.

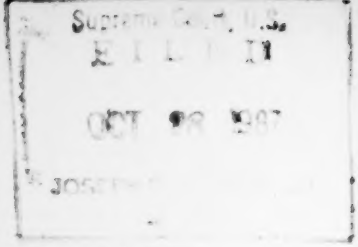
(g) Obtaining Copies. A party or witness who does not have a copy of the deposition may obtain it from the officer taking the deposition unless the court orders otherwise. If the deposition is obtained from a person other than the officer, the reasonable cost of reproducing the copies shall be paid to the person by the requesting party or witness.

RULE 1.080(d), FLORIDA RULES OF CIVIL PROCEDURE

Rule 1.080. Service of Pleadings and Papers

* * *

(d) Filing. All original papers shall be filed with the court either before service or immediately thereafter. If the original of any bond or other paper is not placed in the court file, a certified copy shall be so placed by the clerk.



NOS. 87-507, 87-508

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

PALM BEACH NEWSPAPERS, INC.,

Petitioner,

vs.

THE HONORABLE RICHARD BRYAN BURK, THE STATE OF FLORIDA and LINDA AURILIO,

Respondents.

and

THE MIAMI HERALD PUBLISHING COMPANY,

Petitioner,

vs.

THE HONORABLE RICHARD BRYAN BURK, LINDA AURILIO, and THE STATE OF FLORIDA,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED FOR REVIEW

I. DO THE PRESS AND PUBLIC HAVE A FIRST AMENDMENT RIGHT TO ATTEND PRETRIAL DISCOVERY DEPOSITIONS IN A CRIMINAL CASE?

II. DO THE PRESS AND PUBLIC HAVE A FIRST AMENDMENT RIGHT OF ACCESS TO PRETRIAL DISCOVERY DEPOSITIONS IN A CRIMINAL CASE WHICH MAY OR MAY NOT HAVE BEEN TRANSCRIBED BUT WHICH HAVE NOT BEEN FILED WITH THE CLERK OF COURT OR THE JUDGE?

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STATEMENT OF THE CASE

The Florida Supreme Court held that the press does not have a First Amendment right to be present at pretrial discovery depositions in criminal cases or to demand copies of depositions which are not filed with the trial court. **Palm Beach Newspapers, Inc. v. Burk**, 504 So.2d 378, 382, 383 (Fla. 1987). The Florida Supreme Court rendered its opinion in response to questions certified by the District Court of Appeal, Fourth District of Florida. In this brief, the questions presented for review have been restated to more closely reflect the questions certified to and decided by the Florida Supreme Court. These questions have been raised separately in the petitions of Palm Beach Newspapers, Inc., and the Miami Herald.

In reaching its decision, the Florida Supreme Court reviewed the recent decisions of this Court on access to criminal judicial proceedings and it considered the origin and nature of discovery rights of parties under modern practice, both federal and state. The court found that deposition proceedings are not public components of a trial and were not open to the public at common law. Id. Non-parties do not possess discovery rights and there is no independent right outside the trial process to the information sought in discovery. Id. In so holding, the Florida Supreme Court relied on this Court's decision in **Seattle Times Co. v. Rhinehart**, 467 U.S. 20 (1984), wherein the **Times**, a party to a lawsuit, was accorded no constitutional right to publish information acquired solely by virtue of the pretrial discovery process.

The decision of the Florida Supreme Court expressed deep concern that public access to discovery information at the moment it is produced in a deposition presented an unacceptable hazard to the constitutional rights to a fair trial and a speedy trial, to the privacy rights of parties and non-parties and to the right under the Florida Constitution to trial in the venue of the alleged crime. 504 So.2d at 383. The purpose of criminal discovery in Florida - assisting in the trial or resolution of criminal charges - would not be served by public access to criminal deposition proceedings or to unfiled depositions. Id.

Finally, the court ruled that discovery depositions are not judicial proceedings and that previous Florida case law acknowledging a nonconstitutional right of access to pretrial suppression hearings did

not, by analogy, mandate a similar right of access to deposition proceedings. Id. at 384. The decision did state that once a transcribed deposition is filed with the trial court, it is open to public inspection. Id.

Many of Petitioner's assertions about Florida discovery proceedings are not based on the record, particularly those having to do with the press's alleged "historical access" to the deposition process under Florida practice. The fact that the press may have had occasional access to a filed deposition or to the taking of a criminal deposition by order of a trial court does not thereby establish either a constitutional right or a tradition of access. The state disagrees with the Petitioners' representations about historical access in the following respects.

Palm Beach Newspapers contends that prior to its amendment in 1982, **Florida Rule of Civil Procedure 1.310(f)** required depositions to be filed with the clerk of court and that this filing requirement applied to depositions in criminal cases by virtue of **Florida Rule of Criminal Procedure 3.220(d).**[1] (Pet. at 18) The Miami Herald makes a similar contention. (Pet. at 6) Whether this is so or not, neither rule required that depositions be transcribed. In any given case, it may have been that no deposition was transcribed and filed. There is no record evidence that tells us how many depositions

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[1]This is by no means clear on the face of Criminal Rule 3.220(d) which simply provides in pertinent part that "[t]he procedure for taking such deposition, including the scope of the examination, shall be the same as that provided in the Florida Rules of Civil Procedure." (Petitioners' Joint Appendix at 102).

were filed in criminal cases over any period of time and thus nothing to support Palm Beach's representation that "[a]s a practical matter, the filing requirement assured public access to depositions . . . . Reporters routinely reported depositions to the public as they did other judicial proceedings." (Pet. at 18) If the rule did not compel the transcribing of a deposition, we cannot agree that public access was "assured" or that depositions were "routinely reported."

Petitioner contends that the concerns expressed by the Florida Supreme Court are wholly unfounded in view of Florida's "extensive experience with allowing access to depositions . . . ." (Pet. at 20) There is no record evidence to support this assertion. Petitioner Palm Beach cites only five trial court decisions preceding the decision below that allowed press

attendance at a criminal deposition. (Pet. at 19, n. 14.) The Miami Herald cites the identical cases. (Pet. at 5, n. 3) The earliest of these cited rulings occurred in 1979. We are compelled to disagree that five trial court rulings in criminal cases and three in civil cases reflect "extensive experience" with public access to depositions. Moreover, there apparently was no Florida appellate decision prior to Burk that recognized any constitutional right of access on the part of the press or public to discovery depositions.

SUMMARY OF ARGUMENT

Review of the decision of the Florida Supreme Court is unwarranted because neither the press nor public have any First Amendment right to attend the taking of depositions or to demand copies of depositions from the litigants. There is no conflict in case law as to this issue.

The discovery process is intended to permit a wide and, indeed, almost uninhibited range of inquiry in order to aid the resolution of litigation - whether criminal or civil. Open access to depositions would clearly disserve this purpose. The access rights demanded by the press could easily result in the publication of possibly irrelevant and inadmissible but nonetheless damaging information. Information produced in discovery is often unpredictable, and because the press would have immediate access to it, protective orders are inadequate to prevent dissemination of harmful or prejudicial revelations. Criminal defendants in particular should not be burdened with having to litigate against the press in order to protect their constitutional rights to a fair and speedy trial.

ARGUMENT

A GRANT OF CERTIORARI IS NOT WARRANTED IN THIS CASE SINCE THERE IS NO FIRST AMENDMENT RIGHT OF ACCESS EITHER TO THE TAKING OF DEPOSITIONS OR TO UNFILED COPIES OF DEPOSITIONS, AND THERE IS NO CONFLICT AMONG DECISIONS.

Petitioners invoke the discretionary jurisdiction of this Court pursuant to 28 U.S.C. §1257(3)(1976), which provides that review of a state supreme court decision may be had by writ of certiorari where

> the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution . . . or where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . .

No state statute is at issue, and the purported "right" asserted - that of a non-party to legal proceedings to sit in on depositions or to demand copies of unfiled depositions - has no constitutional status.

Moreover, the rules of this Court provide that a writ of certiorari "will be granted only where there are special and important reasons" such as

> [w]hen a state court of last resort has decided a federal question in a way in conflict with the decisions of another state court of last resort or of a federal court of appeals.

Sup.Ct.R. 17. Far from presenting a conflicting holding, the decision of the Florida Supreme Court is consistent with other state and federal decisions concerning access to and use of discovery materials. The only inconsistent decisions which Petitioners cite are a handful of Florida trial court rulings.

Petitioners point to no decision of this Court or any federal appeals court or state supreme court holding that the taking of a deposition is a judicial proceeding that the press has a constitutional right

to attend. Petitioners cite no appellate decision holding that the press has a right to demand a copy of a deposition from a litigant when the deposition has never been filed with the trial court and is thus not a court record. In fact, as will be discussed, all decisions on which Petitioners rely for conflict involve either 1) discovery material filed with and under the immediate control of a trial court; or 2) confidential information or trade secrets produced in discovery which were subject to a protective order entered under **Rule 26(c), Fed.R.Civ.P.**, to control the parties' use of the information.[2]

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[2]The instant questions, which arose in a state criminal prosecution, are unlikely to occur in the course of federal criminal prosecutions since the Federal Rules of Criminal Procedure do not permit the routine taking of discovery depositions. See Rule 15, Fed.R.Cr.P.

To date, this Court has held that only those proceedings taking place under the direct and immediate control of a trial court are judicial proceedings to which there is a qualified right of access. **Press Enterprise Co. v. Superior Court**, ____ U.S. ____, 106 S.Ct. 2735 (1986)(preliminary hearing in criminal case); **Press Enterprise Co. v. Superior Court**, 464 U.S. 501 (1984)(jury selection proceedings in criminal case); **Waller v. Georgia**, 467 U.S. 39 (1984)(pretrial suppression hearing); **Richmond Newspapers, Inc. v. Virginia**, 448 U.S. 555 (1980)(criminal trial). With respect to the discovery process, this Court has recently stated that "pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law . . . and, in general, they are

conducted in private as a matter of modern practice." **Seattle Times Co. v. Rhinehart**, 467 U.S. 20, 33 (1984). Moreover, in **Seattle Times** this Court unequivocally stated that "[a] litigant has no First Amendment right of access to information made available only for purposes of trying his suit." Id. at 32. Petitioner cites no authority showing that the same conclusions would not be true for discovery proceedings in criminal cases.

The cases on which Petitioners rely simply do not support a claim of conflict. The only state supreme court decision cited for conflict is **State v. Cianci**, 496 A.2d 139 (R.I. 1985). That case, however, concerned the press's objection to a protective order sealing all discovery material to be filed with the trial court before trial. There was no issue of press or public access to the

actual taking of depositions or to unfiled or untranscribed depositions in the hands of the parties.

Petitioners' assertions of conflict with federal appellate decisions are similarly flawed. They cite only one case that concerns access to unfiled discovery material, and that case clearly holds that the press has no constitutional right to such material and a party cannot be compelled to disseminate it to the press. **Oklahoma Hospital Association v. Oklahoma Publishing Co.**, 748 F.2d 1421 (10th Cir. 1984), cert. denied, 473 U.S. 905 (1985). Every other federal appellate decision relied on for conflict with **Burk** involves access to either 1) filed discovery materials, which are court records; or 2) discovery material subject to a **Rule 26(c), Fed.R.Civ.P.**, protective order, entered to control the parties' use of discovered

information. See In re Alexander Grant & Co. Litigation, 820 F.2d 352, 355 (11th Cir. 1987); Anderson v. Cryovac, Inc., 805 F.2d 1, 11-12 (1st Cir. 1986); Cippollone v. Liggett Group, Inc., 785 F.2d 1108 (3d Cir. 1986); In re Agent Orange Product Liability Litigation, 821 F.2d 139 (2d Cir. 1987); In re Reporters Committee for Freedom of the Press, 773 F.2d 1325, 1339 (D.C. Cir. 1985). None of these cases suggests that the First Amendment compels press access to either the taking of depositions or to unfiled discovery material in the hands of litigants.

Petitioners also cite United States v. Smith, 776 F.2d 1104 (3d Cir. 1985), which recognizes a qualified right of access in a criminal case to a filed and sealed bill of particulars containing the names of unindicted coconspirators. If anything,

Burk, which also recognized a qualified right of access to a filed deposition, is consistent with **Smith**.

Whether these federal appellate decisions are in all respects correct and harmonious is not the issue before this Court nor any basis for review of the **Burk** decision. The point is that they do not conflict with the Florida Supreme Court's decision in **Burk** because they do not decide the issue of press and public attendance at depositions or the right of access to depositions in the hands of parties who are unwilling to share them with the press.

We address finally the overwrought assertions that the **Burk** decision "is the most far-reaching limitation of the public's First Amendment right of access to be based on **Seattle Times**," that it imposes "a rule against access which is . . . absolute," and that it displaces

traditional trial court authority with "the whim of a single party." (Palm Beach Newspapers Pet. at 18, 24, 25) Petitioners have failed to establish a First Amendment right for the press or public - as nonparties - to attend depositions; indeed, the very case authorities they cite cannot by any stretch of the imagination be read to recognize such a right. Moreover, the "rule" established in **Burk** is scarcely absolute. While it may be that the objection of one party would suffice to exclude the press from a deposition, the decision in no way prevents the parties from agreeing to let the press attend. And, even assuming the press is excluded by the objection of one party, the decision in no way prevents any party from later providing to the press a copy of the transcribed deposition.

Given that discovery rules allow extensive intrusion into the affairs of litigants and that discovered information could be damaging to reputation and privacy if made public, considerations this Court found compelling in **Seattle Times**, it avails nothing to argue that the decision below operates at the "whim" of the parties. As the **Burk** decision recognized, it is not possible to know in advance precisely what information will be elicited at a deposition, and once sensitive or damaging information becomes public it is too late to seek a protective order. In arguing that press and public access should be controlled by the trial court's power to issue protective orders, Petitioners fail to explain how lawyers can be clairvoyant about information that has yet to come to light or how they can predict the effect of unknown information on the right to a fair

trial or a party's privacy interests. Petitioners simply do not want to acknowledge that "discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes." See **Seattle Times Co. v. Rhinehart**, 467 U.S. 20, 24 (1984).

The potential for abuse of the discovery process is not diminished even if access is sought only to unfiled depositions rather than to their actual taking. A presumptive right to publish discovered information that might be inadmissible, irrelevant, defamatory or prejudicial simply subverts the very purpose of discovery, as **Burk** pointedly states. 504 So.2d at 384. Discovery becomes particularly oppressive when those whose rights and interests are at stake in a lawsuit must engage in additional litigation with the press to protect

themselves from public dissemination of possibly irrelevant, unreliable and inadmissible information. In this context, protective orders become part of the problem instead of the answer, for few persons can match the resources the press can muster for litigation. Unless strictly limited to the "sole purpose" of assisting in preparation and trial of litigated disputes, discovery will become intolerably oppressive, invasive and expensive.

CONCLUSION

The Florida Supreme Court's decision in **Palm Beach Newspapers, Inc. v. Burk** is consistent with other state and federal appellate court decisions finding no First Amendment or common law right of access to unfiled discovery information. The admission of the press and public to pretrial depositions can only serve to

increase the time and expense of litigation, whether criminal or civil, undermine the fundamental rights to a fair and speedy trial, and thwart the candor and openness of the discovery process. Under these circumstances, and in the absence of decisional conflict, certiorari review should be denied.

Respectfully submitted this 26th day of October, 1987.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI in this case was served on October 26, 1987, in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States by depositng three true copies in the United States post office or mailbox, with first-class postage prepaid, addressed to: **RAY FERRERO, JR., WILTON L. STRICKLAND, RICKI TANNEN**, 707 S.E. 3rd Avenue, 6th Floor, Ft. Lauderdale, FL 33316; **DONALD M. MIDDLEBROOKS, L. MARTIN REEDER, THOMAS R. JULIN**, 4000 Southeast Financial Center, 200 South Biscayne Boulevard, Miami, FL 33131; **NELSON BAILEY**, Suite 303, 324 Datura Street, West Palm Beach, FL 33401; **KIRK VOLKER**, Assistant State Attorney, 315 Third Street, West Palm Beach, FL 33401; **GERALD B. COPE, JR., LAURA BESVINICK, GREER, HOMER, COPE & BONNER, P.A.**, 4870 Southeast Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131; **RICHARD J. OVELMEN**, General Counsel, The Miami Herald Publishing Company, One Herald Plaza, Miami, Florida 33101; and **MARGARET GOOD**, Assistant Public Defender, Public Defender's Office, 9th Floor/Governmental Centre, 301 North Olive Avenue, West Palm Beach, FL 33401.

/s/
LOUIS F. HUBENER

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. 87-508

In the Supreme Court of the United States

OCTOBER TERM, 1987

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vs.

THE HONORABLE RICHARD BRYAN BURK, LINDA AURILIO, and THE STATE OF FLORIDA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITIONER'S REPLY BRIEF

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITIONER'S REPLY BRIEF

Petitioner The Miami Herald Publishing Company files this reply to Respondents' Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Florida.

REPLY TO RESPONDENTS'[1] STATEMENT OF THE CASE

The State does not dispute that Florida's criminal justice system is essentially a pretrial process in which more than 97% of all prosecutions are resolved without trial. The State does not question that defendants' expansive discovery rights play a central role in these pretrial dispositions. It does not challenge the fact that the criminal deposition is frequently the only "public window" on this process. Nor does the State address the structural value of public access to criminal deposition transcripts demonstrated in the Petition. Indeed, Respondent Hagler candidly acknowledges the importance of access. Hagler Br. 12-13. The State concedes that in spite of these facts the Florida Supreme Court adopted a per se rule "that the press does not have a First Amendment right . . . to demand copies of depositions which are not filed with the trial court" and in so doing "relied on this Court's decision in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), wherein the *Times*, a party to a lawsuit, was accorded *no constitutional right* to publish information acquired solely by virtue of the pretrial process." State Br. 2 (emphasis added). Thus, the parties do not dispute that the Florida Supreme Court has adopted a per se ban on access to transcripts of a

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1. Respondents the State of Florida and the Honorable Richard Bryan Burk are hereinafter referred to collectively as the "State." Citations to the State's Brief in Opposition are indicated by "State Br. ....." Citations to the Brief in Opposition of Respondent John W. Hagler in companion Case No. 87-510 are indicated by "Hagler Br. ....." Petitioner The Miami Herald Publishing Company has not filed a separate reply in the companion case, *Miami Herald Publishing Co. v. Hagler* ("*Hagler*"), and *Miami Herald Publishing Co. v. State* ("*State*"), Case No. 87-510, and notes that the State has not filed a brief in opposition in that case either.

critical Florida criminal procedure based upon its interpretation of a federal constitutional holding of this Court.

The State explains that the decision of the Florida Supreme Court "expressed deep concern that public access to discovery information *at the moment it is produced* in a deposition presented an unacceptable hazard" to fair trial and privacy rights. State Br. 3 (emphasis added). But the State offers no explanation of why the court believed *transcripts* of criminal depositions should not be made available subsequent to the taking of the deposition. Access to transcripts may be regulated efficiently through appropriate protective orders, thereby eliminating the problems allegedly created by attendance at depositions. The State also fails to acknowledge that criminal depositions routinely are filed with the court, thereby becoming public records, without presenting any hazards. Nor does the State explain why the act of filing with the court eliminates these purported hazards. Criminal depositions most often relate to the lawfulness of the manner in which material evidence is obtained, the conduct of law enforcement officers, or the truthfulness and credibility of key prosecution witnesses. While they are crucial to public understanding of the case, they do not generally, let alone uniformly, threaten any subordinating constitutional interests.

The State asserts that access to unfiled deposition transcripts would not serve "the purpose of criminal discovery in Florida—assisting in the trial or resolution of criminal charges". State Br. 3. But it does not even address, let alone refute, the contention that such access is necessary to public understanding, acceptance, and trust in those "resolutions." *See Richmond Newspapers v. Virginia*, 448 U.S. 555, 570-73 (1980).

The State does not directly deny that journalists have traditionally enjoyed access to depositions taken in criminal prosecutions. Instead the State claims that certain unspecified "assertions . . . are not based on the record," and disputes these "representations about historical access" in two respects. State Br. 4. First, the State notes that Florida's procedural rules do not require that all depositions be transcribed and that "[t]here is no record evidence that tells us how many depositions were filed in criminal cases over any period of time." State Br. 5-6. Consequently the State "cannot agree that public access was assured or that depositions were 'routinely reported.'" *Id.* at 6. Second, the State asserts there is no "record evidence" to support the assertion that Florida has had " 'extensive experience with allowing access to depositions'." *Id.* The State claims the only historical evidence offered is the citation of five criminal cases, none of which dates back any earlier than 1979. *Id.* at 7.

Both of the State's contentions are meritless. Whether the press historically had access to untranscribed depositions is irrelevant to this case. The rule adopted by the Florida Supreme Court bars access to unfiled depositions "which may or may not have been transcribed." State Br. i; *Burk*, App. 5-6. Thus *Burk* bars access to both transcribed and untranscribed depositions. The State cannot rely on the putative lack of "record evidence" of historical access to one class of depositions to justify the denial of access to all. Moreover, transcribed depositions were historically filed, and the press enjoyed access to them.

The State's second contention is simply absurd. All parties concede that a great many deposition transcripts are filed in Florida criminal prosecutions. In fact, depositions must be filed if they are to be considered by the court

in any matter pending before a Florida court. All parties concede that, upon filing, such transcripts are public records. Florida's experience has revealed no problems with this procedure. The hazards to fair trial and privacy rights envisioned by the State have never materialized.

By lack of "record evidence" the State can only mean the specific records of the criminal cases which are the subject of this Petition and its companion.[2] Yet the record in each case demonstrates a presumptive right to attend the depositions themselves. In *State,* the press attended all of the depositions over the State's objections. Petition at 15. In *Hagler,* the press attended the depositions until the State Attorney himself was to be deposed. Petition at 13. In *Burk,* the case began with a motion for a protective order to exclude the press. Petition at 8. It was not until this motion was denied that the parties made what was then a novel argument—that the press had *no right* to attend the deposition or obtain a transcript.

Most telling, the State does not even allude to any fact in any deposition in the record which might have compromised the privacy or fair trial right of any party. The State simply claims the power to exclude the public even where *no* such rights are threatened.

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2. In fact, there is a clear record of the history of deposition access in the court below. The Miami Herald placed before the Florida Supreme Court clear historical evidence of the intent of the drafters of the Federal Rules of Civil Procedure (on which the Florida rules are modeled) gleaned from the notes of the drafters maintained in document repositories around the country. This evidence demonstrated that the drafters presumed that the public would be permitted access to depositions and that the protective order mechanism was developed to respond to this eventuality. *See* Initial Brief of The Miami Herald Publishing Company in the Supreme Court of Florida at 9-19.

The State is mistaken as to the number of reported cases and the significance of their vintage. Prior to the adoption of the "housekeeping rule" in 1981, which ended Florida's practice of routinely filing depositions in the public court file, there was little occasion for litigating deposition access cases. As to the number of criminal deposition access cases reported, sixteen, not five, are cited in the Petition.[3] Contrary to the State's suggestion, prior to *Burk*, the Florida press reported the contents of criminal depositions without incident.

REPLY TO RESPONDENTS' ARGUMENT IN OPPOSITION TO REASONS FOR GRANTING THE WRIT

The State offers three basic arguments against granting the writ. It asserts that *Burk* correctly held there is no First Amendment right of access to deposition transcripts; that *Burk* is not in conflict with the decisions of other courts; and that access to deposition transcripts would compromise privacy and fair trial rights, while burdening criminal defendants with collateral litigation. Each of these claims is mistaken.

The correct rule of law which has emerged from *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), and its progeny is that third-party access to discovery materials may be denied without violating the First Amendment only pursuant to a protective order entered on a showing

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3. Eight, not five, criminal trial court cases are cited in footnote 3 of the Petition alone. An additional three appellate decisions are cited in footnote 5 of the Petition; two more appellate decisions are cited in footnote 13 of the Petition; and these numbers do not include the three cases pending on review before this Court.

of "good cause." Petition at 16-21. This rule follows all significant precedent. *See, e.g., National Polymer Products v. Borg-Warner Corp.*, 641 F.2d 418, 423 (6th Cir. 1981); *Wilk v. American Medical Association*, 635 F.2d 1295, 1299 (7th Cir. 1980). The decision of the Florida court holds that public access to unfiled criminal depositions may be denied without violating the First Amendment even if no protective order has been sought or could be secured. This is error. Access to any phase of the state's criminal justice process is a function of the state's experience with, and the structural value of, such access. The decision below departs from this Court's access jurisprudence.

Moreover, the State is simply mistaken in suggesting that the decisions relied upon in the Petition for conflict address access to *filed* discovery materials. In fact, none of those cases focus on the event of filing and most involve the very issue raised in *Burk*—public access to *unfiled* discovery materials. The State's citation of *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986), is illustrative. In that case, the press challenged the entry of a protective order which restricted public access to *any* "information obtained through discovery." *Id.* at 5. Relying on this Court's decision in *Seattle Times*, the First Circuit upheld the protective order because it was based on a showing of "good cause." The State nonetheless contends that *Anderson* is inapposite. The basis for this contention is another, entirely independent holding reached by the *Anderson* court concerning public access to certain *filed* discovery materials. *Id.* at 11-12. The State's remaining attempts to distinguish the decisions cited in the Petition are similarly flawed.[4] Other cases, such as

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4. *See, e.g., In re "Agent Orange" Product Liability Litigation*, 821 F.2d 139 (2d Cir. 1987) (ordering unfiled discovery

(Continued on following page)

Tavoulareas v. Washington Post Co., 737 F.2d 1170, 1172-73 (D.C. Cir. 1984), the State does not even address.

Since the preparation of the Petition in this case, the Sixth Circuit has joined the First, Second, Third, Seventh, Eleventh and District of Columbia Circuits in construing *Seattle Times* to require a showing of "good cause" to limit public access to *unfiled* discovery materials. In *Courier-Journal v. Marshall,* 828 F.2d 361 (6th Cir. 1987), the Sixth Circuit upheld a protective order "sealing deposition testimony" which revealed the identities of certain individuals belonging to the Ku Klux Klan. *Id.* at 364. The court held that the First Amendment associational rights of the named individuals constituted "good cause" to limit public access. *Id.*

Finally, the State's contention that access to unfiled deposition transcripts would compromise privacy and fair trial rights and create burdensome collateral litigation proves both too much and too little. The argument proves too much because it would apply with equal force to filed and unfiled transcripts. Yet thousands of criminal depositions are filed each year in Florida, and none of the problems asserted by the State have surfaced. These depositions are all public records. In fact, courts have upheld third-party access to discovery materials because such access promotes judicial economy. *See, e.g., Wilk v. American Medical Association, supra.* Clearly, public

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Footnote continued—

materials produced pursuant to protective order unsealed); *In re Alexander Grant & Co. Litigation,* 820 F.2d 352 (11th Cir. 1987) (press sought reconsideration of protective order restricting disclosure of designated unfiled discovery materials); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3d Cir. 1986) (ordering review of protective order restricting public access to unfiled discovery materials).

In re Reporters Committee for Freedom of the Press, 773 F.2d 1325 (D.C. Cir. 1985), which the State cites for its lack of conflict with *Burk*, was not cited for direct conflict by The Miami Herald in the Petition.

access to depositions has long since passed the test of experience.

The State's argument proves too little because it depends in large part on the asserted "surprise" and unpredictability of discovery depositions. This argument, however, can only militate against *attendance* at depositions; it has no force with respect to transcripts of depositions already taken. Only by attempting to conflate, as did the Florida Supreme Court, the issue of transcript access and deposition attendance can the State conjure up even a colorable claim that transcript access carries the potential for any harm. Once a deposition has been taken and transcribed, the protective order mechanism functions equally well to protect the rights of the parties, whether the transcript is filed or not. In these circumstances, the First Amendment must guarantee the public at least the protection of the "good cause" standard.

CONCLUSION

Petitioner The Miami Herald Publishing Company respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petitioner's Reply Brief was served on November 6, 1987, in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States by depositing three true copies in a United States post office or mailbox, with first-class postage prepaid, addressed to:

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